

FEDERAL BUREAU OF INVESTIGATION
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FOI/PA# 1205163-0

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DEFENSE INVESTIGATIVE SERVICE
NATIONAL AGENCY CHECK

FBI CENTRAL RECORDS SYSTEM
RESPONSE TO AN AUTOMATED INDICES RECORD CHECK
(DOES NOT INCLUDE A FINGERPRINT CHECK)

DATE: 11/26/90

CIDN: 0903246610

NAME: BORK, ROBERT HERON

AKA:

DOB: 03/01/27

POB: PA

SOC: 207-18-3675

SEX: M

RACE: W

ADDR:

EMPL:

MISC:

UTD:

FARLEY

4790

SEQUENCE NO: 1476132

ORI NO: USD15000Z

NSA: *T.W.* DATE: *11/28*

NR: TO FR:

FR: *Corl* DATE: *03/01/91*

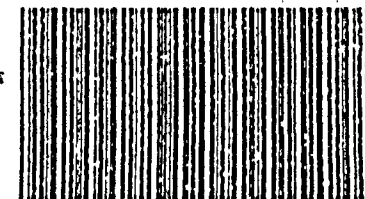
NR: TO EAO:

EAO: DATE:

1972-1973, 1981 and 1987

This reply is a result of a
check of FBI Headquarters
investigative files only. To
check arrest records, request
must be submitted to FBI
Identification Division.
Fingerprints are necessary
for a positive check.

An Applicant-type investigation was
conducted in _____ concerning
the captioned individual. The results
of this investigation were furnished
to the White House. For detailed results
investigation, you are referred
to the White House.



0903246610

A SEARCH OF THE AUTOMATED CENTRAL INDICES OF FBI HEADQUARTERS BASED UPON DATA SUBMITTED AND LIMITED PURSUANT TO ESTABLISHED
POLICY LOCATED NO IDENTIFIABLE INFORMATION PERTINENT TO YOUR INQUIRY. THIS SHOULD NOT BE CONSIDERED AS A CLEARANCE BY THE FBI.

PLAINTEXT

TELETYPE

URGENT

TO SACS WASHINGTON FIELD - ENC. (4) (BSM)
 NEW HAVEN
 CHICAGO
 SPRINGFIELD
 ST. LOUIS
 BALTIMORE

12-11-72

b6
b7C

FROM FOR THE ACTING DIRECTOR FBI W. MARK FELT ACTING ASSOCIATE
 DIRECTOR

Robert H. Bork
 ROBERT HERON BORK, SPECIAL INQUIRY, BUDED DECEMBER EIGHTEEN,
 NEXT, WITHOUT FAIL.

WHITE HOUSE HAS REQUESTED EXPEDITE INVESTIGATION OF BORK WHO
 IS BEING CONSIDERED FOR PRESIDENTIAL APPOINTMENT, POSITION NOT STATED.

BORN MARCH ONE, ONE NINE TWO SEVEN, PITTSBURGH, PENNSYLVANIA,
 AND RESIDES ONE FOUR TWO HUNTINGTON STREET, NEW HAVEN, CONNECTICUT.
 SINCE ONE NINE SIX TWO HAS BEEN ASSISTANT PROFESSOR AND PROFESSOR,
 SCHOOL OF LAW, YALE UNIVERSITY. SEE WHO'S WHO FOR FURTHER BACKGROUND
 DATA.

NEW HAVEN IMMEDIATELY OBTAIN COMPLETE BACKGROUND DATA COVERING
 ENTIRE ADULT LIFE, INCLUDING IDENTITIES AND LOCATIONS OF ALL CLOSE
 RELATIVES AND SET OUT LEADS AT ONCE. FURNISH SOCIAL SECURITY NUMBER
 TO WFO FOR IRS CHECK.

FEDERAL BUREAU OF INVESTIGATION
 COMMUNICATIONS SECTION

NOTE: Request received today from White House.

ENCLOSURE

DHY:cld

8 FEB 5 1973

DEC 12 1972

MAIL ROOM ☐

TELETYPE UNIT ☐

RETURN TO MR. YOUNG, ROOM 1258

Felt _____
 Baker _____
 Callahan _____
 Cleveland _____
 Conrad _____
 Dalbey _____
 Gebhardt _____
 Jenkins _____
 Marshall _____
 Miller, E.S. _____
 Purvis _____
 Soyars _____
 Walters _____
 Tele. Room _____
 Mr. Kinley _____
 Mr. Armstrong _____
 Ms. Herwig _____
 Mrs. Neenan _____

0118 : 079

ENERGIE

2025-01-09 10:00:00

FD 205 dated 12/18/72 From AX
Delayed to 12/22/72 Reason Difficulty
in arranging interview with "Hengstler"
S. Warren rather poor & his not being
available. Efforts being continued
2nd Admin. Action OK.

LETTER

MISS

CONFIDENTIAL
IDENT BULLDOG GROUP - 100001

TELETYPE TO WASHINGTON FIELD
RE: ROBERT HERON BORK

CHECK RECORDS OF ALL APPROPRIATE BARS AND BAR ASSOCIATIONS,
INCLUDING ABA.

DUE TO URGENT NATURE OF REQUEST, IT IS IMPERATIVE BUDED BE MET
WITHOUT FAIL. NO DELAY WILL BE TOLERATED.

SPIN.

DEC 11 2 16 PM '75

111111 2-1

Federal Bureau of Investigation
Records Branch12/12/72, 1972☒ Name Searching Unit - Room 6527☐ Service Unit - Room 6524

b6

☒ Forward to

b7C

☒ Attention ☒ Return to CARO U 1234

Supervisor

Room

Ext. 2346

Type of References Requested:

☐ Regular Request (Analytical Search)☒ All References (Subversive & Nonsubversive)☐ Subversive References Only☐ Nonsubversive References Only☐ Main _____ References Only

Type of Search Requested:

☐ Restricted to Locality of _____☐ Exact Name Only (On the Nose)☐ Buildup☐ VariationsSubject BORK, ROBERT H.Birthdate & Place 3/1/27, Pittsburgh, PAAddress 142 Huntington St.New Haven, Connecticut

Localities _____

R# _____

Date 12/12/72

Searcher

Initials 346

Prod. _____

FILE NUMBER

SERIAL

MR

PLEASE EXPEDITE

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 11, 1972

TO: Robert H. Haynes, FBI

FROM:

[Redacted]

b6
b7C

SUBJECT: FBI Investigations

Subject's Name BORK, Robert H.

Date of Birth: 3/1/27 Place of Birth: Pittsburgh, Pa.

Present Address: 142 Huntington Street, New Haven, Conn.

We Request: Copy of Previous Report

 Name Check

X Full Field Investigation

The person named above is being considered for:

 White House Staff Position

X Presidential Appointment

 Position with another Agency

Attachments:

 SF 86 (in duplicate)

 SF 87, Fingerprint Card

X Biography

REMARKS:

*tel to WFO, NH,
CG, SI, SL, BA
12-11-72*
[Redacted]

REPORT SHOULD BE DELIVERED BY FBI TO:

[Redacted]

b6
b7C

161-
ENCLOSURE

9206-1

BORK, Robert E., lawyer, educator; b. Pitts-
burgh, Pa., 1927; s. Harry Philip and Elizabeth (Kun-
ze) R. B.A., U. Chi., 1944, J.D., 1947; m.
Claire Davidson, June 15, 1952; children: Robert
Merrin, Charles E., Ellen E. Admitted to Ill. bar,
1953; also, and mem. from Kirkland, Ellis, Houston,
Chaffetz & Masters, Chgo., 1955-62; asso. prof.,
Yale Law Sch., 1962-65, prof. law, 1965; Served
with USMC, 1944-46. 50-52. Home: 1825 Mun-
ton St., New Haven 06511.

BORK, Hans, soprano, conductor, Germany,
1924; studied acting Reinhardt Sch., voice
in Vienna and Italy. Operatic debut, Switzerland;
appeared Berlin and Munich festivals, 1951; ap-
peared prin. opera houses, Germany, Italy, Eng. and
Portugal; Am. debut as Electra, San Francisco
Opera Co. also solo appearances Los Angeles,
Chgo., Buffalo, Montreal, Phila. orcha.; appeared
La Scala, Milan, Italy in Panna, 1953, in Irish
Legend at Salzburg Festival; debut Met. Opera
House, 1958. Designated Kammerängerin, Rome.
9405 Wiesloch, Switzerland. Office: care Eric
Semon, 31 W. 57th St., N.Y.C.

BORKO, Harold, information scientist, psychol-
ogist, and educator; bora in New York City,
New York, on February 4, 1922; s. George and
Hilda (Karpel) E.; student Coll. City N.Y., 1939-
41; E.A., U. Cal. at Los Angeles, 1943; M.A.,
U. So. Cal., 1949, Ph.D. in Psychology, 1952;
m. Hannah Levin, June 22, 1947; children—Hilda,
Martin. System Eng. specialist RAND Corp., 1956-
57; with System Devel. Corp., Santa Monica, Cal.,
1957-68, asso. staff head lang. processing and
retrieval staff, 1965-68; instr. psychology U.
So. Cal., 1957-65; instr. Sch. Library Service, U.
Cal. at Los Angeles, 1965-68, professor, since
1968; Served with AUSA, 1942-46; to capt.,
Med. Service Corps, AUSA, 1950-56. Mem. Am. Docu-
mentation Inst., pres. 1966; Am. Computing
Machinery, Am. Psychol. Assn., Phi Beta Kappa,
Sigma Xi, Phi Gamma Mu. Author: Computer Ap-
plications in the Behavioral Sciences, 1962; Au-
tomatic Language Processing, 1967. Also, s. ed-
itor Information Storage and Retrieval, 1963;
editor Information Sci. Books, 1963—book
rev. editor Jour. Ednl. Data Processing. Home:
11507 National Blvd., Los Angeles 90064.

BORLAND, Bruce Sylvester, transportation exec.;
b. Youngstown, O., Mar. 27, 1902; s. Samuel and
Mary Jane (Jones) E.; student U. Pitts.; m. Mary
Elizabeth Henninger, Apr. 4, 1928; children—Bruce
H., John H., Richard S. Banker, Butler County
Nat. Bank, 1920-25; nat. bank examiner, 1925-27;
staff Ernst & Ernst, C.P.A.'s, 1927-31; with General
American Transportation Corp., Chgo., 1931—
treas., 1939—Treas., dir. Christopher House,
Community Neighborhood House, Presby., (deacon,
elder), Mason, Home: R.R. 2, Box 112A, South
Sylvan Dr., Mundelein, Ill. Office: 135 S. LaSalle
St., Chgo.

BORLAND, Chauncey Blair, real estate; b. Chi-
cago, Ill., Nov. 26, 1913; s. John Jay and Harriet
(Blair) E.; grad. Lawrenceville (N.J.) Sch., 1937;
A.B. Harvard, 1941; Harvard Law Sch., 1st yr.; m.
Belle McCullough, June 23, 1944; children—Harriet,
Beatrice, Martha. With John H. Wrenn, co. of
1902-03, Northern Trust Co., 1903-46 in charge of
same; pres. Borland Mfg. Co. partner Betts Borland
same; pres. Borland Mfg. Co. partner Betts Borland
& Co. Mem. Chgo. Crime Comm. Member board of
Trustees Presby. Luke Hospital. Episco-
palian. Clubs: Harvard (Chgo., N.Y. and Boston);
Chicago Commercial, University, Chicago Athletic
(Chicago); New York Yacht. Home: 2450 Lake
View Ave. Office: 165 S. LaSalle St., Chicago.

BORLAND, Hal (Harold Glen), writer; b. Sterling,
Neb. May 14, 1900; s. William Arthur and Sarah
M. (Cinnaburg) E.; student U. Colo., 1918-20 Litt.
D., 1944; H.Litt. Columbia, 1923; m. 2d. Barbara
Evelyn Dodge, 1945; children by previous marriage—
Harold (deceased), Donald, Diana (step-daughter).
(Mrs. James C. Thomson, Jr.), Reporter Denver
Post, 1935; asso. ed. Flagler (Colo.) News, 1920-
21; reporter Brooklyn (N.Y.) Times, 1921, United
Press, N.Y.C., 1921-22; with King Feature Service,
N.Y.C., 1922; various positions with East Lake City,
N.Y.C., 1922-24; telegraph editor Asheville (Tex.)
Carson City, Fresno, San Diego and Marshall (Tex.)
papers, 1923-24; telegraph editor Asheville (Tex.)
papers, 1923-24; publicist 1925; pub. Stratton
(Chgo.) Press, 1925-26; asst. night editor Phila. Mor-
ning Sun, 1927-28; editorial writer Phila. Mor-
ning Ledger, 1929-33; lit. editor morning and evening
Ladders, Phila., 1934-37; staff writer N.Y. Times,
1937-43; outdoor editorial essayist, N.Y. Times, Sun-
day editorial page, 1942—columnist Berkshire
Eagle, Pittsfield, Mass., 1954—Dir. non-fiction
sect. Writers Conf. Rocky Mountains, U. Colo.,
1955. Mem. bd. supervisors Bartholomew's Cobble
Nature Reservation, Ashley Falls, Mass., 1963—
Served in USNRP, 1918. Recipient Westerners
Buffalo award for best nonfiction, 1957; 1957,
duty Education Bd.'s ann. book award; 1962; also
Columbia Journalism Alumni award, 1962; Edward J.
Meehan Conservation Writing award, 1967. Mem.
Phi Gamma Delta (New York). Author: Heaps of Gold
(Century, 1922). Rocky Mountain Tipi Tales, 1924;
Valor, 1924; Wapiti Pete, 1925; What Is America?
(play, with Philip Dunning), 1935; America Is Amer-
icans (poems), 1942; Am. American Year, 1946; H. &
Wide and Lonesome, 1956; How To Write and Sell
Non-Fiction, 1956; This Hill, This Valley, 1957; The
Amulet (novel), 1957; The Enduring Pattern, 1959;
The Seventh Winter (fiction), 1960; The Dog Who
Came to Stay, 1961; Beyond your Doorstep, 1962;
The Youngest Shepherd, 1963; When the Legend
Died, 1963; Sundial of the Seasons, 1964; King of
Squaw Mountain 1944; Countryman, A Summary
of Relief, 1965; Hill Country Harvest, published
1967; Homeland, A Report from the Country,
Trouble Valley, 1934; Highway to Timberline, 1937;
Christmas Plants, 1969; Country Winter's Day, 1970;
Trouble Valley, 1934; Highway to Timberline, 1937.

in Plant Pathology, 1940, Ph.D., 1941; s. Dr.
Albert (Paul) Finkbeiner (Paul) Agr. U., 1940; m.
Margaret C. Gibson, Sept. 24, 1937; children—
Nancy Jean (Mrs. Richard H. Rhoads), William Gib-
son, With U.S. Forest Service, 1933-39; instr. U.
Minn., 1941; research scientist, DuPont de Nemours
Plant., 1942-44; assumed position of research sci-
entist in wheat Rockefeller Found., Mexico, 1943,
Centro Internacional de Mejoramiento de Maiz y
Trigo, Mexico, 1946—; Leonard L. Kilmer, lect.
Agr. Mex., 1946, Recipient citation and award
from Govt. and farmers of Tlaxcala, Mexico, 1945,
wheat farmers Yacuti Valley Chichil Obregon, So-
nora, Mexico, 1947; diploma of honor Wheat Farm-
ers Queretaro, Mexico, 1946, Wheat Farmers and
State of Zacatecas, Mexico, 1958; Outstanding Achieve-
ment award U. Minn., 1959, also E.C. Skakman
award, 1962; Distinguished Citizen award Cresco,
1968; Nat. award Agr. Editors Assn., 1947; Ann.
award Nat. Council Comm. Plant Breeders, 1968;
Distinguished Service medal, Pakistan, 1963; cita-
tion, street named in honor Citizens of Sonora
and Rotary Club, 1968; Internat. Agronomy award
Am. Soc. Agronomy, 1968. Hon. fellow Indian Soc.
Genetics and Plant Breeding; mem. Nat. Acad. Sci.
India; Sierra Club, 69, Lomas de Chapultepec,
Mexico City. Office: Londres 40, Mexico City 6,
Mexico.

BORMAN, Abraham, chm., exec. com. Borman
Food Stores, Inc. Office: 12300 Mark Twain Av.,
Detroit 32227.

BORMAN, Clyde Edward, banker; b. Trenton,
N.J., Aug. 9, 1917; s. Albert and May (Mittler)
E.; A.B., McKendree Coll., Lebanon, Ill., 1932;
postgrad. Wis. U., 1932; m. Rosalia Volpentesta,
Vice pres. dir. Alton Banking & Trust Co. (Ill.),
1946-62; pres. Am. Bank & Trust Co., South Bend,
Ind., 1962-64; pres. Citizens Bank & Trust Co.,
Park Ridge, Ill., 1964—; m. 1960-62, Served with USNR,
1942-46, Recipient Silver Beaver award Boy Scouts
Am., 1962, Mem. Am. Ill. (past div. pres.) Bank-
ers Assn., U.S. Park Ridge chambers commerce, Ec-
clarian, Elk. Contr. articles prof. Jours. Home: 333
Capri Terrace, Wheeling, Ill. 60090. Office: Citizens
Bank, No. 1 N.W. Hwy., Park Ridge, Ill. 60068.

BORMAN, Frank, astronaut; b. Gary Ind., Mar.
14, 1928; s. Edwin Borman; R.S., U.S. Mil.
Acad., 1950; M.Aero. Engng., Cal. Inst. Tech.,
1957; grad. USAF Aerospace Research Pilots Sch.,
1960; m. Susan Hughes; children—Frederick, Ed-
win. Comm. 2d Lt. USAF, advanced through
grades to col., 1963; assigned various fighter
squadrons, U.S. and Philippines 1951-54; Instr.
thermodynamics and fluid mechanics U.S. AF
Acad., 1957-60; instr. USAF Aerospace Research
Pilots Sch., 1960-62; now astronaut with Manned
Spacecraft Center, NASA; command pilot on
14 day orbital Gemini 7 flight, Dec. 1967, in-
cluding rendezvous with Gemini 6. Decorated Dis-
tinguished Service award NASA, 1967. Address:
Manned Spacecraft Center, NASA, Houston 1.

BORMAN, Paul, corp. exec. b. Detroit, 1932;
ed. Mich. State U., 1954. Formerly v.p. now
pres. Borman, Inc. (formerly Borman Food Stores,
Inc.) also dir. Home: 1446 Aldmore, Birmingham.
Mch. Office: 12300 Mark Twain Av., Detroit 27.

BORMANN, Frederick Herbert, educator, ecologi-
st; b. N.Y.C., Mar. 24, 1922; s. Carl E. and
A. Gertrude (Ankle) E.; B.A., Rutgers U., 1948;
M.A., Duke, 1950, Ph.D., 1952; m. M. Christine
Williamson, June 20, 1952; children—Rebecca E.,
Bernard T., Amelia E., Lincoln H. Instr., then
asst. prof. Emory U., 1952-56; from asst. prof.
to prof. Dartmouth, 1956-66; prof. forest ecology
Tale, 1966—; Cons. For Found., 1967—; mem.
vis. comm. APC, 1965—; mem. ecology div. com.
Ecological Soc. Lab., 1961. Served with USNR,
1942-45, Recipient George Mercer Award Ecol.
Soc. Am., 1954, Mem. Ecol. Soc. Am., Am. Inst.
Bird. Sci., A.A.A.S., Am. Civil Liberties Union.
Prof. research ecology of pine, root grafting,
nutrient cycling in ecol. systems. Home: Carlisle
Hill Dr., Remond, Conn. Office: 370 Prospect
St., New Haven 06511.

BORMANN, Sister Mary Clara, librarian; b. Cedar
Rapids, Ia., Sept. 17, 1914; d. John Henry and
Gertrude (McLaughlin) Bormann; A.E., Clarke Coll.,
1940; B.L.S. Coll. St. Catherine, 1944; M.L.S.,
U. Mich., 1954, Tech. Cons. Sch., Milw., 1937-38;
library asst. Mundelein Coll., Chgo., 1938-44, asst.
librarian, 1944-50, librarian, 1950—, Mem. Am.
Lib. Catholic (com. chm.) library asst. Democrat.
Editor: Periodical Bindings in Eleven College Li-
braries in the Chicago Area, 1962. Address: 6363
Sheridan Rd., Chgo. 60624.

BORN, Ernest (Alexander), architect; b. San
Francisco, 1898; A.E. U. Cal., 1922, M.A., 1925;
Tansig Traveling Fellow, 1923; certificate Am.
Sch., Fontainebleau, 1925; Resident Paris Painting
Acad., 1928. Designer: John Reid, Jr., 1924-29;
John Galen Howard, 1926, George Kelham, 1927,
Gehron & Ross, 1929-30, Shreve, Lamb & Harmon,
1930-31; pt. practice architecture, San Francisco,
1937—; prin. works include War Meml., Graniteville,
Mass., 1944, housing project, San Francisco, 1951;
cons. architect M. E. Fletcher Co., West Chelms-
ford, Mass., 1930-63; design, editorial cons.
Archit. Record, Archit. Forum, 1931-36; prof.
architecture U. Cal., 1953-57; Guggenheim
Fellow, 1960-61, Mem. San Francisco Art Comm.,
1947-50, Recipient Burch Rutledge Long Prize
Archit. League N.Y., 1930, C. Valentine Kirby award,
Chgo. chapt. A.T.A., 1957, award of high honor,
1954 Fellow A.T.A. Member San Francisco Planning
and Housing Assn., 1945, San Francisco Art
Assn. (pres. 1951) 1954-55, San Simeon Delta
Author: The New Architecture in Mexico, 1937;
A Plan for Fisherman's Wharf (for San Fran-
cisco Port Authority), 1941, Home: 2020 Great
Hwy., San Francisco 16, Office: 720 Montgomery
St., San Francisco 11.

BORN, Harold Joseph, educator, physicist; b.
Evansville, Ind., Nov. 22, 1927; s. Harold O. and
Dorothy, Ind., Nov. 22, 1927; s. Harold O. and

SEAN, Max, phd., b. Breslau, Germany (now
Poland), Dec. 11, 1907; s. Gustav and Margaret
(Kaufmann) E.; student Breslau, Heidelberg, Zurich
univs.; Ph.D., Goettingen U., 1927; D.Sc. (hon.),
Bristol U. Eng., 1928; M.A., Cambridge U. Eng.,
1933; D.Sc. (hon.), Bordeaux U., 1945, Oxford U.,
1954; Dr. rer. nat., Freiburg U., 1957, Berlin U.,
Frankfurt U., LL.D., Edinburgh U., 1957; Dr. Ing.
(hon.), Stuttgart Tech. U., 1960; D.Sc. (hon.),
Oslo U., 1961, Brussels University, 1961; Dr. rer.
nat. (honorary), Frankfurt University, 1964; m. Hed-
wig Ehrenberg, August 2, 1913, children—Irene
(Mrs. Newton, John), Margaret (Mrs. Freese),
Gustav V.R. Privat-docent, Goettingen U., 1909,
prof., 1921; guest lectr., U. Chgo., 1942; prof. G.
Rortin, 1919, Frankfurt University, 1919, Göttingen,
1921; guest lecturer at Massachusetts Inst. Tech., 1925; Stokes lectr. Cambridge U. Eng.,
1923; guest prof. Indian Inst. Science, Bangalore,
1935-36; prof. natural philosophy, Edinburgh, Scot-
land, 1936-38, emeritus, 1953—, Decorated Stokes
medal, Cambridge, 1934; Macdougall-Brisbane and
Gunning-Victoria Jubilee prize, Royal Soc. Edinburgh,
1945, 1950; Max Planck medaille, Germany, 1948;
Hughes medal Royal Soc. London, 1950; Freedom
City of Goettingen, 1953; Nobel prize, 1954; Grotius
Medal, Munich, 1956. Member of the Royal Society
of Edinburgh, Royal Society of London; mem.
acad. Berlin, Goettingen, Copenhagen, Stockholm,
Moscow, Dublin, Am. Acad. Arts and Scis., Nat.
Acad. Sci. Author many books and articles, mostly
on theoretical physics. Home: Marcardstr. 4, Sand
Fyrmon, Germany.

BORNE, Mortimer, artist; b. Rypin, Poland, Dec.
31, 1902; s. Harry and Lena (Warsaw) E.; student
schs. U.S. and abroad; m. Rachel Zipes, Feb. 28,
1929. Came to U.S., 1914, naturalized, 1921. Ex-
hibited major graphic exhibns., 1926—one-man
shows Internat. Coll. Springfield, Mass., 1940, Cedar
Rapids (Ia.) Art Assn., 1940, Corcoran Gallery of
Art, Washington, 1941, Mus. Fine Arts, Montreal,
Can., 1942, Grand Central Art Galleries, N.Y.C.,
1943, Smithsonian Instn., Washington, 1944, Currier
Gallery, Manchester, 1945, Connoisseur Gallery,
New York City, 1959, Tappan Zee Art Center,
Nyack, N.Y., 1962; lecturer Sweet Briar Coll.,
1945; lectr. art New Sch. Social Research, N.Y.C.,
1945—; works reproduced various maga., newspapers;
represented permanent collections Mus. Modern Art,
Library Congress, Nat. Mus., Syracuse, Rochester,
N.J. State museums, N.Y. Pub. Library, Rosenwald
Collection, Met. Mus. Art (100 etchings and
drawings), C. Judah, Los Angeles; pioneer in
technique for color drypoint using 3 plates;
originator new method for woodcuts. Recipient
of J. Frederick Talcott prize from the Society
American Etchers, 1939, Noyes prize for best print
Soc. Am. Etchers 25th Ann. Exhbn., 1943, Mem.
Soc. Am. Etchers, Audubon Artists, Ecclarian.
Developed methods chromatic wood sculpture;
creator Rotary Family of Peoples (chromatic wood
sculpture). Author articles on art. Address: 107
S. Broadway, Nyack, N.Y.

BORNEHMAN, Alfred, educator, metallurgist; b.
Montclair, N.J., Apr. 6, 1906; s. Emil E. and Marie
(Kiddie) E.; M.E. Stevens Inst. Tech., 1927; D.
Eng., Technische Hochschule, 1930, m.
Helen Marie Holten, Aug. 2, 1930; children—Re-
becca Jane (Mrs. Skiffington), Toni Marie (Mrs.
McKerrow). Assistant professor of chemical en-
gineering Stevens Inst. Tech., 1930-39, asso. prof., 1939-
48, prof. metallurgy, head dept., 1948—; cons.
Trustee Stevens Academy, Mem. Maria Mitchell
Assn. of Nantucket, Mass. (vice pres.), Am. Soc.
Metals (author, co-editor Metals Technology 1954),
American Society for Testing and Materials, also
Am. Chem. Soc., Am. Inst. Mining and Metall.
Engrs., Inst. Metals (Eng.), Am. Foundrymen's
Soc., Beta Theta Pi, Episcopalian. Clubs: Com-
mopolitan (Montclair); Nantucket Yacht. Home:
60 Gates Av., Montclair, N.J.

BORNEHNER, Walter Carl, surgeon; b. Cass
County, Neb., Apr. 22, 1901; s. Charles and Lena
(Schubert) E.; B.A., N. Central Coll., 1923;
M.D., Northwestern U., 1929; m. Mahel Kemp,
May 29, 1926; children—Lois Mary (Mrs. Louis
John Kettel), Beatrice Ann (Mrs. Milton Schlem-
mer), Walter Carl II. Practice in Chgo., 1929—;
mem. staff Ill. Masonic Hosp., 1934—, at-
tending surgeon, 1935—; hon. cons. surgeon Resur-
rection Hosp.; instr. surgery Northwestern U. Med.
Sch., 1934-52, Pres. Th. Ind. Chgo. and Cook
County, 1962-64, Pres. Niles Township High Sch.
Ed. Edn., 1972. Served to mal., M.C., A.T.S. World
War II: MTO. Recipient Distinguished Alumni
award N. Central Coll., 1962, Diplomate Am. Bd.
of Surgery, Fellow A.C.S.; mem. A.M.A. (speaker
ho. dist. Chgo. 1963), Ill. med. assn.,
Chgo. Surg. Soc., Surg. Soc. Rome (hon.), World
Med. Assn., Phi Chi, Scaphoid and Blade, Lutheran.
Contrib. med. jous. Address: 4667 W. Peterson
Av., Chgo. 60646.

BORNHOLDT, Wallace John, mfg. co. exec.; b.
Peoria, Ill., Dec. 24, 1907; s. John and Barbara
Katherine (Kold) E.; student U. Ill., 1925-29;
m. Katherine M. Allen, June 17, 1929, With Cater-
pillar Tractor Co., 1928—, v.p., 1963—, Mem.
Am. Soc. Metals, Am. Ordnance Assn. Mason, Ro-
tarian. Clubs: American (London, Eng.); Le Cercle
du Dauphine (Grenoble, France); Country of Pro-
fess. American (Geneva, Switzerland). Home: 135
E. Oak Flat Ct., Peoria 16114. Office: 100 N.E.
Adams St., Peoria, Ill. 61602.

BORNHUTTER, Daniel, Lawrence, law co. exec.;
b. New York City, June 17, 1912; s. Benjamin and
Margaret (Foster) E.; B.A., Coll. Wooster, O., 1933;
M.B.A., Columbia, 1935; m. Cynthia Dillman, Sept.
8, 1956; children—Ronald Lawrence, Linda A.,
With Nat. Bur. Casualty Underwriters, 1953-66,
Attorney, 1944-66; v.p., Century Gen. Reinsurance
Corp., N.Y.C., 1966—, Served with U.S. Army,
1955-57, Fellow Charities Actuarial Soc.; mem.
Insurance Congress Actuarial Assn. Acad. Actuaries

ENCLOSURE

PLAINTEXT

TELETYPE

URGENT

12-12-72

51
TO SACS WASHINGTON FIELD
CHICAGO
NEW HAVEN
SPRINGFIELD
ST. LOUIS
BALTIMORE

FROM FOR THE ACTING DIRECTOR FBI W. MARK FELT ACTING ASSOCIATE
DIRECTOR

ROBERT HERON ^DBORK, SPECIAL INQUIRY, BUDED DECEMBER EIGHTEEN,
NEXT, WITHOUT FAIL.

REBUTEL DECEMBER ELEVEN, LAST.

WHITE HOUSE PUBLICLY ANNOUNCED ON DECEMBER EIGHT, LAST, BORK IS
BEING CONSIDERED AS DEPUTY SOLICITOR GENERAL OF U. S.

DEPARTMENT OF JUSTICE HAS REQUESTED THAT IT BE FURNISHED COPIES
OF REPORTS OF INVESTIGATION RE BORK.

SUBMIT RESULTS OF SPECIAL INQUIRY INVESTIGATION [REDACTED]
TO REACH BUREAU BY BUDED. THEN IMMEDIATELY PREPARE REPORTS IF
NECESSARY AND SUBMIT THREE COPIES OF SAME TO BUREAU PROMPTLY.

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 12 1972

6:32 pm
TELETYPE

DEC 15 4 05 PM '72

161-9206-2
NOT RECORDED

12 JAN 31 1973

NOTE:

DHY:cld

58 FEB 5 1973

MAIL ROOM ☐

TELETYPE UNIT ☐

RETURN TO MR. YOUNG, ROOM 1258

Felt _____
Baker _____
Callahan _____
Cleveland _____
Conrad _____
Dalbey _____
Gebhardt _____
Jenkins _____
Marshall _____
Miller, E.S. _____
Purvis _____
Soyars _____
Walters _____
Tele. Room _____
Mr. Kinley _____
Mr. Armstrong _____
Ms. Herwig _____
Mrs. Neenan _____

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : Director, Federal Bureau of Investigation

DATE: 12-12-72

FROM

Exec. Asst. to DAG

Robert Heron Bork

SUBJECT

Robert H. Bork

DATE OF BIRTH

3-1-27

POSITION

Deputy Solicitor General

OFFICE OR DIVISION (Location)

Solicitor General

(CHECK ONE)

TYPE OF POSITION

☐

EMPLOYEE

☒

APPLICANT

☒

SENSITIVE

☐

NON-SENSITIVE

ENTERED ON DUTY

TYPE OF APPOINTMENT

☒

Please institute the usual character investigation in this matter and forward copies of the reports to this office.

☐

Please furnish results of Name Check and search of Identification Records prior to completion of investigation.

Standard Forms 86 are attached. Please return the original signed copy with the final report of this investigation.

☐

Name Check made

☐

Fingerprint Chart attached

☐

Please institute a name check of this individual whose Standard Form 57/86 is enclosed. The Fingerprint Chart is being forwarded to the Identification Building.

161-9206-2

☐

Please discontinue the character investigation in this matter. Standard Form 86 submitted with our request should be returned to this office.

NOT RECORDED

23 JAN 17 1973

3 ENCLOSURE

59 JAN 24 1973

b6
b7C

ALPHABETICAL LIST OF TEACHERS

Law, (S). Comm. on Marijuana and Drug Abuse, 801 19th St., N.W., Wash., D.C. 20006.

BONOVITZ, SHELDON M., Lect. Temple Univ. School of Law, (215) LO-8-6300. b. 1937. Subjects: *Taxation, Federal*, (S) *Priv. Prac.*, 1617 Land Title Bldg., Phila., Pa. 19110.

BOOKER, RUSSELL E., Lect. Univ. of Richmond, The T. C. Williams School of Law, (703) 285-6336. b. 1899. Subjects: *Legal Profession*. Retired Exec. Dir., Va. State Bar, 8 Roslyn Road, Richmond, Va. 23226.

BOOKSTAVEN, DAVID R., Prof. Univ. of Pittsburgh School of Law. b. 1905. B.A., 1926, Cornell; J.D., 1928, Yale. Admitted: New York, 1929. Research Ass't, Yale, 1928-29; Assoc., Taylor, Blanc, Capron and Marsh, 1929-34; *Priv. Prac.*, 1934-38; Partner, Stephens and Bookstaver 1938-42; Att'y., O.P.A., 1942-43; Spec. Att'y., Dept. of Justice, 1943-47; Prof. and Dean, American Univ., 1947-57; Prof., Univ. of Pitt., since 1957. Subjects: *Estate Planning*, (S); *Personal Property*; *Real Property*; *Taxation, Federal*; *Trust Administration*, (S); *Trusts and Estates*. New York Wills and Trusts (with Fingar and McQuaid), 1949, 1961, 1970; New York Will Manual (with Fingar) 1956; Pennsylvania Will Manual, 1964. Member: Conf. Summer: Univ. of So. Cal., 1962; Univ. of No. Car., 1964; Cal. Hastings, 1967. Res. Consult., N.Y. Law Rev. Comm., 1952-54, 1968-71. Trustee, D.C. United Fund, 1952-56.

BOOKSTEIN, EDWARD L., Lect. Albany Law School, Union Univ., (518) 434-0136. b. 1925. Subjects: *Labor Law*. Partner, Kohn, Bookstein and Karp, 100 State Street, Albany, New York.

BOOMS, ROBERT TABOR, Ass't Dean, Univ. of Denver College of Law, (303) 753-3656. b. 1944. A.B., 1966, Dartmouth Coll.; J.D., 1970, Univ. of Denver. Admitted: Colorado, 1970. Foreign Tax Mgr., The Gates Rubber Co., Denver, Colo., 1966-70; Placements Dir., Univ. of Denver, 1970-71; Ass't Dean, since 1971.

BORDEN, DAVID M., Lect. Univ. of Connecticut School of Law.

BOREN, GARY L., Assoc. Prof. Washington Univ. School of Law. b. 1936. B.A., 1957; LL.B., 1961, U.C.L.A. Note and Comment Ed., U.C.L.A. L. Rev. Admitted: California, 1962. *Priv. Prac.*, Los

Angeles, Calif., 1961-67. Ass't Prof., Wash., St. Louis, 1967-71; Assoc. Prof., since 1971. Subjects: *Oil and Gas*; *Taxation, Federal*; *Taxation, State and Local*; *Water Rights*. Member: Conf.

BORGESON, EARL C., Librarian, Harvard Univ. Law School. b. 1922. B.S.L., 1947; LL.B., 1949, Univ. of Minn.; B.A. Law Librarianship, 1950, Wash., Seattle. Admitted: Minnesota, 1949. Grad. Student, School of Lib. Science, Wash., Seattle, 1949-50. Ass't Librarian, Wash., Seattle, 1950; Ass't Ref. Librarian, Los Angeles Co. Law Library, 1950-52; Ass't Librarian, Harvard, 1952-54; Librarian, since 1954. U.S. Navy, 1943-46. Member: A.A.L.L., Pres., 1968-69. Summer: Univ. of Philippines, 1966; New York Univ., 1967. Consultant, Asia Foundation, Survey of Asian Law Libraries, 1963.

BORINS, STEPHEN, Canadian Assoc., Assoc. Prof. Osgoode Hall Law School, York University, (416) 635-3113. b. 1934. LL.B., 1959, Toronto. Ed., Faculty of L. Rev., Toronto. Admitted: Ontario, 1961. Law Clerk, Ct. Justice of Sup. Ct., Ontario (Trial Div.), 1961-62; Assoc., Croll, Borins & Goldberg, 1962-67; Partner, Borins & Goldberg, 1967-69; Counsel, Borins, Goldberg & Birenbaum, since 1969; Assoc. Prof., Osgoode Hall, since 1969. Subjects: *Civil Procedure*; *Criminal Law*; *Criminal Procedure*, (S); *Torts*; *Trial and Appellate Practice*, (S) *Cases and Materials on Canadian Civil Procedure (with Watson, G.D.)*, 1971. Member: Advocates Soc. Consultant, Evidence Proj., Ontario Law Reform Comm., since 1969; Consultant, Canadian Radio-Television Comm., since 1969; Dir., Canadian Judicial Conf., since 1970; Mem., Area Com., County of York Legal Aid Plan, since 1970; Benchet, Law Soc. of Upper Canada, since 1971.

BORK, ROBERT HERON, Prof. Yale Law School, (203) 432-4836. b. 1927. B.A., 1948; J.D., 1953, Univ. of Chicago. Managing Editor, Chi. L. Rev. Admitted: Illinois, 1953. Res. Assoc., Univ. of Chicago, 1953-54; *Priv. Prac.*, New York City, 1954-55; *Priv. Prac.*, Chicago, 1955-62; Assoc. Prof., Yale, 1962-65; Prof., since 1965. U.S.M.C.R., 1945-46 and 1950-52, 1st Lt. Subjects: *Constitutional Law*; *Antitrust*. On leave, 20 Jan. to 30 June 1972.

BORMAN, PAUL DAVID, Ass't. Dean and Prof. Wayne State Univ. Law School, (313) 577-3952. b. 1939. B.A., 1959; J.D., 1962, Univ. of Mich.; LL.M., 1964, Yale. Admitted: Michigan, 1963. Staff Att'y., U.S. Comm. on Civil Rights, Wash., D. C., 1962-63; Ass't U.S. Atty., U.S. Atty., Eastern Dist. of Mich., Detroit, 1964-65; Vice Pres. and House Counsel, Borman Food Stores, Detroit

1965-67; Spec. Team, Detroit, 1965. Mayor Jerome P. Dean and Assoc. Ass't. Dean and Criminal Law, 1965. Criminal Procedure Preventive Detent 416, 1971. Summ. Detroit-Wayne Co. Services Bd., 1965. Bd. of Trustees, 1965. Comm. on the Adm. Disorders; Chrm. Crim. Internship C

BOSEN, NICHOLAS, Prof. of Students, Univ. of Chicago, (773) 2404. b. 1941. 1966, Univ. of C. Law Clerk, Justice Ct., 1966-67; Ass't. Chicago, Ill., 1967. Wash., D.C., 1969.

BOSHKOFF, L., Dean, Indiana Univ., (317) 337-4630. b. 1912. Harvard. Admitted 1960. *Priv. Prac.*, 1960. Teaching Fellow, 1961. Wayne State, 1962. Visiting Assoc. Prof. Assoc. Prof., 1963-64. Dean, since 1969; Vice Dean, since 1969; Cont. Liton; Securities Texas, 1962; New York

BOSKEY, JAV, Univ. School of Law, 1964. Princeton Univ. LL.M., 1971. Lond. Admitted: New Jersey, 1968. Res. Ass't. U. Ind., Indianapolis, 1968. June Prof., Clevel-Marl Subjects: *Business Law*; *International Law*; *Torts*; *Trusts*; *Am. Bar Ass'n*; *Soc. for Stud. of Int'l Law*; *Am. S*

BOSKEY, JAV, Case Univ., Clevela

161-9206-2

ENCLOSURE

Met Opera House, 1905 D
Wienacht Switzerland Office
York City NY 10019

W & N Bergen, N.J.
grad Hill Sch, 1924
Aug 18, 1935
Hogen County County
N.J., pres Bergen Le
pres John H. Call
and Mem Palisades
N.Y. p, 1970, pres.
N.Y. mem exec bd.
470 Bd. reg Bergen
1 Gen, 23 p Bergen
comm Hosp, 1945-
won, 1967, mem State
out board N Bergen
C Law med civic
Comm Christians and
N.J. 1969, hon M.D.
Amen (life), Palisades
Leachman N.Y. 67601

Kearon, N.J., Sept. 4,
1948. A.M., Ph.D.,
U.S. Pacific Relations,
1948-51, research asso.
1952-53, lectr. Peking
univ., 1953. Mem. Am.
Soc. Author American
nat., The United States
Home: 172 Sullivan St.

educator; b. American
sea (Dunn) B; B.S., U.
tch. Nov. 8, 1945, Engle-
wood, Salt Lake City.
b's Lake City, 1950-53;
1954-65. dir. U. Utah
Newage Works for Utah.
-Dunn, 1955-57; dir.
-Dunn, 1968-70. Served as
-Edn, Am. Soc. Mil.
Research Found., Am.
-er Works Assn., Water
T engers, Am Soc. C.E.,
Tou. Tau Beta Pi, Chi
-guide Dr Salt Lake City

b. 7 1919; s Kaarlo and
Emmi, 1937-45, M.Sc.,
Lundholm, Feb. 10, 1950;
divorced, 1945-48, as
res in Europe, Am., Asia,
West Opera Co., State
Stockholm, Sweden; guest
Art, State Opera Vienna
music. Served to sr. 1st
class of Liberty 4th class
cross for sci. and arts
Denmark Office:
100022

M.E.C., Oct. 3, 1916; A.
 Civil Engineering, Cooper
 Univ., 1940, E.D., Johns
 Tech., 1958; m. Audrey
 Williams; Elvert, one son.
 Position city N.Y. U.S.
 Engineers Co., 1937-43; with
 U.S. Postgrad. Sch.
 of engineering, U. Md.,
 and mechanics, 1968-
 70; as prof. Technische
 Univ., sci. exchange prof.
 1964-65; as prof. Air Force
 Sch. of Biophysics Marine
 Corps, prof. Technische
 Univ. as prof. Kresler-Borg
 distinguished Alumnus
 1967; Fellow A.A.S.
 of Engineering Ed. Sigma
 Chi; elected to Matrix-Tensor
 Soc. Structural Analysis,
 1962; Matrix Tensor
 Soc. Member Structural
 Analysis, 1962; 2nd St Hoboken NJ

Psychologist, b. Milan,
Italy; came to U.S.,
1917, M.A., 1949, Ph.D.
Cornell-Lynn, Kim, Lee,
& Joffe, research asso-
ciates, Russell Sage Found.,
New York, N.Y., 1959-61;
former dept sociology,
University of South Caro-
lina; to bus and gov't,
Director Rand McNally &
Co., Fellow Am Psychol
Soc., VI Social Assn.
of Am, Editor Sociol
Quarterly, co-editor Handbooks of
Sociology. Home: Rupert
Hochberg, Copenhagen, Denmark.
Lecturer (Lichinger) B.; ed.
J. Soc. Psych., Mar 17, 1953;
adolescence, children by
ed. L.S. Ginzburg, 1948,
1950, 1952-54; studied at
Vienna and Berlin with

BORGEN, BJORN KROGH, finance co. exec.; b. Andalsnes, Norway, Sept. 22, 1937; b. Truls Krogh and Helene (Gallebe) B.; came to U.S., 1948, naturalized, 1957; B.S., U. Wis., 1962; M.B.A., Harvard, 1966; m. Katherine Elizabeth Sharp, Aug. 15, 1964; 1 dau., Krista Helene. Financial analyst Gen. Electric Co. Lynn, Mass., 1962-64, v.p. portfolio mgmt. Financial Programs, Inc., Denver, 1966-69, exec. v.p. Founders Mut. Depositor Corp., Denver, 1969—, also dir.; v.p., dir., Founders Growth Fund, Founders Spl. Fund; v.p. Founders Securities Corp., Founders Income Fund, Mem. Phila.-Balt.-Washington Stock Exchange, Mem. Denver Soc. Security Analysts, Sigma Alpha Epsilon, Home, 3131 E. Alameda Av Denver CO 80209 Office: First Natl Bldg Denver CO 80202

BORGHEICHT, GRACE, art dealer; b. N.Y.C., Jan. 25, 1915; d. Samuel L. and Jeanette (Salvy) Lubell; M.A., Columbia, 1937, student (André Lhote, Paris, France, 1934; m. Jack Borgheicht, Jan. 30, 1938 (div. 1954); children: Janis, Berta, Lois, m. 2d, Norman Sachs, Jr., 1957; 1956 (div.); m. 3d, Warren Brandt, Dec. 27, 1960, Div., owner Grace Borgheicht Gallery, Inc., 1951; adviser Tupperware Art Found. Scholarship and Bus. Meets the Arts, Young Pres. Org., One man exhbs. include Laurel Gallery, N.Y.C., 1947, 48, 50, Philbrook Mus., Tulsa, 1948, Everhart Mus., Scranton Pa., 1948; group exhbs. include Nat. Assn. Women Artists, 1948, 49, L'Association Nationale des Femmes Artistes Americaines, 1949, Internat. Watercolor Exhbn., 1949, 53, 1955, 59, Contemporary Art, Paimung, 1951, N.Y. Soc. Women Artists, 1953, Whitney Mus. ann. exhbs., 1954, Aquarelles Contemporaines aux Etats-Unis, France, 1954, Martha Jackson Gallery, N.Y.C., 1955, represented in permanent collections of Philbrook Mus., Everhart Mus. Recipient first prize watercolor Nat. Assn. Women Artists, 1949, Mem. N.Y. Soc. Women Artists, Nat. Assn. Women Artists, Art Dealers Assn., Am. Club Artists (1918 N.Y.C.). Home: 138 E 95th St New York City NY 10025 Office: 10018 Madison Av New York City NY 10021

FORGER, HUGH DONALD, former utility exec.; Edgewood, Pa., Sept. 22, 1905; s. William Edward and Alice Anneta (Cane) B.; student Duquesne U., U. Pitts.; m. Gladys Ellertson, 1932; 1 da., Nancy Jean, With Peoples Natural Gas Co., Pitts., 1935-7; chief accountant, 1934, asst. treas. 1934-42, treas. 1942-51; chief 1951-54, exec. v.p. 1954-55, pres. 1955-70; ret.; exec. v.p. operations Consol. Natural Gas Co., 1963-64; pres. 1964-66, chm. chief exec. officer, 1966-70; dir. Pitts. Nat. Bank; Mem. Allegheny Conf. on Community Devel. Bd. dir. Suburban Gas Hosp. Mem. Am. Gas Assn. Presby. Address: Blackburn Rd. 2D 4 Sewickley, Pa. 15141

BORGES, JORGE LUIS, author, educator; b. Aug. 24, 1899; ed. in Switzerland, also Cambridge (Eng.) and Buenos Aires (Argentina) Univs. Formerly prof. English and N. Am. lit. Buenos Aires U.; now dir. Nat. Library Buenos Aires Recipient Premio de Honor, 1961, Fondo de las Artes, 1963; co-recipient Prix Formentor, 1961; named knight Brit. Empire, Mem. Acad. Argentina de Letras. Author: *Luna de Efecto*; *Cuaderno San Martín*; *Historia de la Eternidad*; *Antología Clásica de la Literatura Argentina*; (with Margarita Guerrero) *El Mar y Fierro*; *La Poesía Gauchescas*; *El Aleph*; *El Jardín de Senderos que se bifurcan*; *Inquisiciones*; *Otras Inquisiciones*; *Historia de la Eternidad*; *Historia Universal de la Infamia*; *Fervor de Buenos Aires*; *Picciones*; *Labyrinth*; *Libro de Cielo y del infierno poético*, 1960; *El Hacedor*, 1960; *Antología personal*, 1961. Address: Mexico 564 Buenos Aires Argentina.

BOGRIUM, James LINCOLN DE LA MOTHE - sculptor, photographer; b. Stamford, Conn., Apr. 9, 1912; m. John Gutzon and Mary (Montgomery) B.; student Lukin Mt. Acad., San Antonio, Tex., 1925-27, Valley (Wyo.) Ranch Sch., 1928-30; studied sculpture under father for 12 years, also in Europe, 1929, 31; m. Lovelia Jones, Dec. 6, 1937 (dec. Nov. 1963); children--Anna Mary April, James Gutzon; m. 2d, Mrs. Richard Ellsworth, Apr. 9, 1964; children--Richard, Paul, Robert Ellsworth, Apprentice W. Tex. Pub. Utilities Co., Abilene, 1931; with Mt. Rushmore Nat. Mem'l., Black Hills, S.D., 1932-- charge measurements and enlarging models, 1934-38, app'd. supt. Mem'l. by Mt. Rushmore Mem'l. Comm., 1938, app'd. sculptor to complete Mem'l. following his father's death, 1940, mem. comm., 1960--; app'd. supt. by Nat. Park Service, U.S. Dept. Interior; tech. adv. in carving worlds largest known sapphires in Arkansas, Washington, Jefferson, Eisenhower; executed statue Our Lady of Loretto, La Bahus Mason, Goliad, Tex., bust Pres. Johnson, near Keystone, S.D. Hon. mem. Lincoln Sesquicentennial Comm., trustee Mt. Rushmore Nat. Mem'l. Soc., Black Hills, Rapid City, S.D., Pres. Whooping Crane council Girl Scouts U.S.; mem. Beavely City Council, 1955-61, Mem. Co. Tex. Hereford Assn. Club; Rotary. Has exhibited color photography work in salons at Milw., Rochester, N.Y., N.Y.C.; colored photographs used for covers of This Week and Saturday Post. Author: My Father's Mountain, 1963. Home and Office: box 2325 Hartington TX 77550

ORGLUND, WILLIAM HOLT, newspaper exec.; b. Muskogee, Okla., Feb. 4, 1912, s. John and Netrie Gertrude (Holt) B.; grad. Muskogee Jr. Coll., 1934; A.B., B.S. in Journalism, U. Okla., 1936; m. Eunice Katherine West, Jan. 6, 1938; children—Krustin, John. Salesman, Griffin Wholesale Grocery Co., Muskogee, Okla., 1930-32; chief Newspaper Enterprise Assn., Inc., 1936—, successively mem. sales staff, Clev., Southwest west mgr., Dallas, Midwest mgr., Chgo., 1936-48, sales mgr., Clev., 1946-63, gen. sales mgr., 1963—, v.p., 1973—, dir., 1953—. Mem. pub. comm., zoning bd. city Shaker Heights (U.) 1954-62. Mem. Nat. Sales and Marketing Execs. Assn., Sigma Execs. Club of Clev. (pres. 1955-56), Pi Sigma Epsilon, Kappa Sigma, Republican. Prebytn. (trustee). Clubs: Cleveland Athletic, Canterbury Golf (Clev.). Home: 111 Pepperwood Lane Pepper Pike OH 44124 Office: 12000 34 St Cleveland OH 44113

ORGMAN, LUCILLE CO., educator; B.A., U. Mich., 1925, M.A., 1925. Now prof. math., chmn. dept. Detroit Inst. Tech. Address: Dept Math Detroit Inst Tech Detroit MI 48201

ORCMYER, ERNEST, journalist, Bus. & finance editor Omaha World-Herald. Office: 14th and Dodge Sts Omaha NE 68102*

BORG OIVIER, GEORGE, prime minister Malta; b. Valletta, July 5, 1911; ed. Lyceum and Royal U. Malta; in D.Litt. Elected to Council of Govt., 1939, to Legislative Assembly, July, 1947; minister Works and Reconstruction, 1950-55, leader Opposition, 1955-58, prime minister and minister Econ. Planning and Finance, 1962—, also minister Commonwealth and Fin. Affairs, 1965—. Leader Nationalist Party. Decorated Knight Grand Cross Order of St. Sylvester and Order Pius IX (Vatican). Address: Auberge d'Argon Valletta Malta.

BORGSTEDT, DOUGLAS, cartoonist, editor, b. Yonkers, N.Y., Jan. 3, 1911; s. Henning and Jennie (Klotz); B.S. student S. Kent Sch., 1927-29; Haverford Coll., 1929-31; P.A. Mus. Sch. Art, 1932; m. Jean MacLatchie, Mar. 29, 1958. Cartoonist editor Sat. Evening Post, 1940-42, photography editor, 1945-45; editorial cartoonist King Features Syndicate, 1964-; Phila. Evening and Sunday Bul., 1968-; cartoons exhibited at Mus. Modern Art, Met. Mus., Berkshire Mus., Pittsfield, Mass.; lectr. at univ., 1964-; represented permanent collection Syracuse U. manuscript collection, served with AUS, 1943-45. Decorated Bronze Star medal, Legion of Merit. Mem. Assn. Am. Editorial Cartoonists, Nat. Cartoonists Soc. Home: Valley Forge PA 19481. Office: Editorial Offices Phila Evening and Sunday Bul. Philadelphia PA 19101

BORGSTROM, GEORG ARNE, educator, scientist; b. Gustav Adolf, Sweden, Apr. 5, 1912; s. Algot and Anna (Lütörin) B.; B.S., U. Lund, (Sweden), 1932, M.S., 1933; D.Sc., 1939; m. Greta Ingrid Stromback; children—Lars, Gerd (Mrs. Arne Linder). Swea. Came to U.S., 1956, naturalized, 1962, Asst. prof. plant physiology U. Lund, 1933; head Inst. Plant Research and Food Storage, Nynäshamn, Sweden, 1941-43, head Swedish Inst. Food Preservation Research, Göteborg, Sweden, 1948-56, prof. 1953-56; prof. food sci. Mich. State U., 1956; prof. Geography, 1966. Recipient of Inter. Soc. for Plant. Sci., 1963. Distinguished Faculty, 1964, Mich. State U., 1969. Fellow World Acad. Arts and Sci.; Royal Inst. Health, Agr., 1969. Nutrition, Royal Swedish Academies Engrng and Agr. Sci.; mem. Inst. Food Technologists, Assn. Am. Geographer, Am. Soc. Plant Physiologists. Author: *The Transverse Reactions of Plants*, 1939; *Japan's World Success in Fishing*, 1964; *The Hungry Planet*, 2d ed., 1967; *Principles of Food Science*, 2 vols., 1968; *Too Many—A Study of Earth's Biological Limitations*, 1969; *Editor: Fish as Food*, 4 vols., 1960-64; *Atlantic Ocean Fisheries*, 1961. Home: 4550 Commanche Dr Okemos MI 48864 Office: Dept Food Sci Mich State Univ East Lansing MI 48823

BORIS, WALTER RAOUL, utility exec.; b. Amsterdam, N.Y., Sept. 7, 1921; a. Michael and Mary (Hewa) B.; B.S. in Eng'ng., U. Mich., 1948, LL.B., 1950; m. Dorothy Dake, Dec. 28, 1946; children—Cherry Dake, Perella Dake, Emily Dake. Admitted to N.Y. and Mich. bars, 1952, with Consumers Power Co., Jackson, Mich., 1950—, sec., 1956, now v.p. finance; dir. Mich. Gas Storage Co., S.H. Camp Co. Pres. Union Sch. Dist., 1963, Family Service Jackson, 1956; v.p. Land o' Lakes council Boy Scouts Am., 1967, chmn. regional planning, 1967. Bd. dirs. Samuel High Camp Found., Citizens Research Council Mich.; trustee Jackson Y.W.C.A., 1956-67. Served to capt. USAAF, 1941-46. Decorated Air medal, D.F.C. Mem. Alpha Tau Omega, Phi Alpha Delta, Republican, Baptist, Mason, Rotarian (pres. Jackson 1967-68). Home: 2017 Glen Dr Jackson MI 49203 Office: 212 W Michigan Av Jackson MI 49201

BORISON, HERBERT LEON, educator, pharmacologist; b. B'lym., May 20, 1922, a. Solomon and Beckie (Garber) B.; B.S., City Coll. N.Y., 1941; M.S., N.Y.U., 1942; Ph.D. Columbia, 1948; m. Rosaline Lackowitz, Nov. 5, 1944; children—Ellen Anel, Adam Bruce. Instr. pharmacology Columbia, 1947-50; mem. faculty U. Utah, 1950-62; asst. prof. pharmacology, 1955-62; prof. pharmacology Dartmouth Med. Sch., 1962-; cons. in field, 1957-; Guggenheim fellow, 1957. Spl. research brain-stem physiology and pharmacology.

DORR, LESTER SKENE, ret. army officer; comd. b. Astoria, N.Y.; Dec. 26, 1906; s. Paul Danneil and Elizabeth Fredericks (Bayer) B.; student Club of City N.Y., also U.S.J., 1923-25; S.S., A.B., U.S. M.A., Acad., 1929; spl. student U. Va. Law Sch., 1938-39; m. Betty R. Safford, Apr. 23, 1932; children Sally (Mrs. Earle F. Lasseter), Susan Fernald. Commd. 261st U.S. Army, 1929; instr. law U.S. M.A. Acad., 1939-42; acting prof. law, 1942-43; regtl. comdr., 1943-45; acting adjutant adv. 8th Army, also chief del. counsel Japanese mil. war crimes tribunal, 1946; assigned Armed Forces Staff Col., 1947; Hawaiian serial chief staff, 1947-50; chief plans for ign. mil. aid, these chief distn. Office Asst. Chief Staff for Logistics, Washington, 1950-52, assigned Nat. War Coll., 1952-53; asst. chief staff U.S. Army Europe, 1953-55; asst. comdr. 8th Dwt. Ft. Carson, Colo. 1955-56; chief U.S. Army Mil. Dist. Mich., 1956-58; sr. army adviser Nationalist China, 1958-60; comdr. Armor and Arty. Firing Center, Ft. Stewart, Ga., 1960-62; ret., 1962; pres. Econ. Club of Detroit 1962-69; sr. cons. NEJ, Inc., Washington, 1969--; ret. Detroit Mortgage & Realty Co., Decorated Bronze Star (3), Purple Heart, Legion of Merit, Combat Infantry Badge (U.S.); Cross de Guerre with Palm, various medals Nationalist China, Sweden, China, Denmark, Chile, Denmark, Norway, Germany, Austria, St. Clair Golf and Country Home, 1620 Oak McLean Va. 10101 Office, NEJ Inc. Chas. Hamlr Jr. 36 W. Newk. Washington, DC 20006.

BORK, ROBERT HERON, lawyer, educator; b. Pitts., Mar. 1, 1927; Harry Philp and Elizabeth (Kumke) B.; B.A., U. Chgo., 1948, J.D., 1953; m. Claire Davidson, June 15, 1952; children: Robert Heron, Charles E., Ellen E., Admitted to IL bar, 1955; assn. and mem. firm Kirkland, Ellis, Houston, Chaffetz & Masters, Chgo., 1955-62; assn. prof. Yale Law Sch., 1962-65, prof. law, 1965-. Served with USMC, 1945-46, 50-52. Home: 142 Huntington St New Haven CT 06511.

BORKE, MITCHELL LOUIS, educator; b. Warsaw, Poland, Mar. 23, 1919; s. Ignacy and Luba (Portugal) B.; student U. Warsaw Med. Coll., 1937-39; B.S., U. Ill., 1931, M.S., 1933, Ph.D. 1937; m. Helene Fink, Dec. 27, 1944; U. children—Louis Elene, Susan Elizabeth. Came to U.S., 1947, naturalized, 1950. Asst. chemistry U. Ill., 1951-53, instr., 1953-57; asst. prof. Sch. Pharmacy Duquesne U. 1957-61, asso. prof., 1961-64; prof., 1964-; dir., inst., AEC/NSF Insts. Nuclear Sci. Tech. Sch. Sci. Tech., 1964-66; AEB/NSF Inst. Sci. Tech. and Chem.

BORKO, HAROLD, inform.
N.Y.C., Feb. 4, 1922; s. Geo.
City N.Y., 1939-41; B.A., U.
Conn., 1949, Ph.D. in Psychol-
ogy, 1947; children—Haida, Mar-
1956-57; with System Devel-
opment staff head lang. proce-
psychology U. So. Cal., 1951
at Los Angeles, 1965-68, pr-
to capt., Med. Service
Documentation Inst. (res. 1.
Psychol. Assn., Phi Beta Ka
Computer Applications in the
Language Processing, 1967
and Retrieval, 1963—; editor
1970—; book rev. editor Jol-
11507 National Blvd. Los A.

BORLAND, BRUCE SY
Youngstown, O., Mar. 27, 19
s; student U. Pitts; m. Ma
children Bruce H., John H.,
Bank, 1920-25, nat bank c
C.P.A.s, 1927-31; with Ge
reas, 1959-70, ret., 1970. Tr
Neighborhood House, Presb
Box 290 South Sylvan Dr N

BORLAND, CHAUNCEY
20, 1878, s John Jay and Ha
Sch, 1897; A.B., Harvard
McCullough, June 23, 1904
With John H. Wrenn & Co.,
in charge of Borland property
pres Borland Mfg. Co.; pas
Crime Commn. Trustee F
Clubs Harvard (Chgo., I
University, Chicago Athletic
Lake View AV Chicago IL 6
60604

BORLAND, HAL. (Harold)
1900; s. William Arthur and
Colo., 1918-20, Lit. D., 194
Ross Dodge, 1945; children
Donald, Neil (dec.), Diana
Reporter Denver Post, 19
1920-21; reporter Bklyn. T
King Feature Service, N.Y.
City, Carson City, Fresno,
1923-24; telegraph editor A
1925; pub. Stratton (Colo.)
Morning Sun, 1927-28; e

1929-33; lit. editor, *Morning Star*, writer N.Y. Times. S. Essayist N.Y. Times, Sunday columnist. Pats. Press, 1966. Mountains, U. Colo., 1955. Reservation, Ashley Falls. Recipient Westerners' Buffalo award Secondary Education Columbia, 1962; John Burroughs Conservation W. Me. Sigma Delta Chi. Mountains of Gold (verse), 1922. 1934, Wapiti Peak, 1938. Dunning, 1942; America's High, 1946; High, Wide and on-Fiction, 1956; This H. 1957; The Enduring Pattern: The Dog Who Came to Stay; Youngest Shepherd, 1962; Untidiness of the Seasons, 1966. Countryman: A Summary of Homeland, A Report from Country Editor's Boy, 1970. Valley, 1934, Halfway to Hell, 1965. Collaborator on other fiction, popular fiction, 1967-; Address: R.

ORLAND, WILLIAM H
hmn. bd. Macher. Hutch
wp. Chgo. Clubs: Univer
nks (N.Y.C.), Cypress Po
60045 Office: Two First

[illegible]

161-9206-2
ENCLOSURE

NOMINATIONS SUBMITTED TO THE SENATE

The following list does not include promotions of members of the Uniformed Services, nominations to the Service Academies, or nominations of Foreign Service officers.

Submitted January 4, 1973

ELLIOT L. RICHARDSON, of Massachusetts, to be Secretary of Defense.
 FREDERICK B. DENT, of South Carolina, to be Secretary of Commerce.
 PETER J. BRENNAN, of New York, to be Secretary of Labor.
 CASPAR W. WEINBERGER, of California, to be Secretary of Health, Education, and Welfare.
 JAMES T. LYNN, of Ohio, to be Secretary of Housing and Urban Development.
 CLAUDE S. BERNICK, of California, to be Secretary of Transportation.
 JOHN A. SCALL, of the District of Columbia, to be the Representative of the United States of America to the United Nations with the rank and status of Ambassador Extraordinary and Plenipotentiary, and the Representative of the United States of America in the Security Council of the United Nations.
 KENNETH RUSH, of New York, to be Deputy Secretary of State, vice John N. Irwin II.
 WILLIAM J. PORTER, of Massachusetts, a Foreign Service officer of the class of Carter Minister, to be Under Secretary of State for Political Affairs, vice U. Alexis Johnson.
 WILLIAM J. CASEY, of New York, to be Under Secretary of State for Economic Affairs (new position).
 DONALD RUMSFELD, of Illinois, to be the United States Permanent Representative on the Council of the North Atlantic Treaty Organization, with the rank and status of Ambassador Extraordinary and Plenipotentiary, vice David M. Kennedy.
 JOHN N. IRWIN II, of New York, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to France, vice Arthur K. Watson, resigned.
 DANIEL P. MOYNIHAN, of New York, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to India.

NOMINATIONS SUBMITTED TO THE SENATE—Continued

Submitted January 4, 1973—Continued

RICHARD HELMS, of the District of Columbia, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to Iran, vice Joseph S. Farland.
 JOHN A. VOLPE, of Massachusetts, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to Italy.
 WILLIAM E. SIMON, of New Jersey, to be Deputy Secretary of the Treasury, vice Charles Walker, resigned.
 EDWARD L. MORGAN, of Arizona, to be an Assistant Secretary of the Treasury, vice Eugene T. Rossides, resigned.
 WILLIAM P. CLEMENTS, JR., of Texas, to be a Deputy Secretary of Defense, vice Kenneth Rush.
 JOSEPH T. SNEED, of North Carolina, to be Deputy Attorney General, vice Ralph E. Erickson.
 ROBERT H. BORK, of Connecticut, to be Solicitor General of the United States, vice Erwin N. Griswold.
 JOHN C. WHITAKER, of Maryland, to be Under Secretary of the Interior, vice William T. Pecora, deceased.
 RICHARD W. ROBERTS, of New York, to be Director of the National Bureau of Standards, vice Lewis M. Branscomb, resigned.
 FRANK C. CALUCCI, of Pennsylvania, to be Under Secretary of Health, Education, and Welfare, vice John G. Veneman, resigned.
 EGM. KROGH, JR., of Washington, to be Under Secretary of Transportation, vice James M. Beggs, resigned.
 ALEXANDER P. BUTTERFIELD, of California, to be Administrator of the Federal Aviation Administration, vice John H. Shafer, resigned.
 FRANK C. HERRINGER, of Virginia, to be Urban Mass Transportation Administrator, vice Carlos C. Villarreal, resigned.
 JAMES R. SCHLESINGER, of Virginia, to be Director of Central Intelligence, vice Richard Helms.
 WALTER E. WASHINGTON, of the District of Columbia, to be Commissioner of the District of Columbia for a term expiring February 1, 1977 (reappointment).

NOMINATIONS SUBMITTED TO THE SENATE—Continued

Submitted January 4, 1973—Continued

ROBERT H. MORRIS, of California, to be a Member of the Federal Power Commission for the remainder of the term expiring June 22, 1973, vice John A. Carver, Jr., resigned.
 JAMES KROGH, of Connecticut, to be Director of the United States Information Agency, vice Frank J. Shakespeare, Jr.

CHECKLIST OF WHITE HOUSE PRESS RELEASES

Listed below are releases of the Office of the White House Press Secretary during the period covered by this issue which have not been included in the issue.

Released January 3, 1973

News briefing: on a meeting with the President on creating a Roberto Clemente Memorial Fund to assist the victims of the Nicaraguan earthquake—by Daniel M. Galbreath, president, Pittsburgh Pirates, and David Giusti and Steve Blass

Released January 4, 1973

Biographical data (3 releases):

Major General Alexander M. Haig, Jr., Deputy Assistant to the President for National Security Affairs and Vice Chief of Staff-designate, United States Army
 James C. Fletcher, Administrator, National Aeronautics and Space Administration
 George M. Low, Deputy Administrator, National Aeronautics and Space Administration

Released January 5, 1973

News briefing: on the President's statement on redirecting executive branch management—by John D. Ehrlichman, Assistant to the President for Domestic Affairs

ACTS APPROVED BY THE PRESIDENT

NOTE: The first session of the 93d Congress began on Wednesday, January 3, 1973. No acts approved by the President were received by the Office of the Federal Register during the period covered by this issue.

Annual Index

NOTE: The Annual Index to documents appearing in Issues 1-53 of Volume 8 is being printed and distributed separately.

The index for the first quarter of 1973 will begin with next week's issue, and will be printed at the back of the issue as has been customary.

161-9206-2
 ENCLOSURE

PLAINTEXT

TELETYPE

URGENT

12-14-72

TO SACS PITTSBURGH
SAN FRANCISCO

FROM FOR THE ACTING DIRECTOR FBI W. MARK FELT ACTING
ASSOCIATE DIRECTOR

161-9206-3

ROBERT HERON BORK, SPECIAL INQUIRY, BUDED:

DECEMBER EIGHTEEN, NEXT, WITHOUT FAIL.

RE NEW HAVEN TELETYPE TO BUREAU DECEMBER TWELVE, LAST,
AND LOS ANGELES TELETYPE TO BUREAU DECEMBER THIRTEEN, LAST.

DEPARTMENT OF JUSTICE HAS REQUESTED IT BE FURNISHED
RESULTS OF INVESTIGATION RE BORK WHO IS BEING CONSIDERED
FOR DEPUTY SOLICITOR GENERAL AND OF SUCCEEDING SOLICITOR
GENERAL AT TERMINATION SPRING TERM, UNITED STATES SUPREME
COURT.

SUBMIT RESULTS BY TELETYPE FOLLOWED BY THREE COPIES
EACH REPORT.

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 14 1972

237/p DKS
TELETYPE

DEC:vsb
(3)

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

58 FEB 5 1973

TELETYPE

MAIL ROOM ☐ TELETYPE UNIT ☒ RETURN TO MR. CARO, ROOM 1254.

Felt _____
Baker _____
Callahan _____
Cleveland _____
Conrad _____
Dalbey _____
Gebhardt _____
Jenkins _____
Marshall _____
Miller, E.S. _____
Purvis _____
Soyars _____
Walters _____
Tele. Room _____
Mr. Kinley _____
Mr. Armstrong _____
Ms. Herwig _____
Mrs. Neenan _____

576

COMMUNICATIONS SECTION

DEC 12 1972

TELETYPE

Mr. Felt	_____
Mr. Ecker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. Dalbey	_____
Mr. Gebhardt	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, E.S.	_____
Mr. Purvis	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Ms. Herwig	_____
Mrs. Neenan	_____

MARTIN
ROOM 1216

NR004 NH PLAIN

830PM URGENT 12/12/72 LM

TO: ACTING DIRECTOR, FBI

CHICAGO

NEW YORK

PITTSBURGH

SPRINGFIELD

WFO

ST. LOUIS

FROM: NEW HAVEN (161-1518) (P) 6PP

ROBERT HERON BORK, SPECIAL INQUIRY, BUDED DECEMBER EIGHTEEN,
NEXT, WITHOUT FAIL.

REBUTEL DECEMBER ELEVEN LAST.

FOR INFO PITTSBURGH AND NEW YORK WHITE HOUSE HAS REQUESTED
EXPEDITE INVESTIGATION OF BORK WHO IS BEING CONSIDERED FOR
PRESEDENTIAL APPOINTMENT, POSITION NOT STATED. APPOINTEE
INTERVIEWED DECEMBER TWELVE SEVENTYTWO AND FURNISHED THE
FOLLOWING BACKGROUND DATA:

BIRTH: MARCH ONE TWENTYSEVEN AT PITTSBURGH, PA.

END PAGE ONE

NOT RECORDED

12 JAN 31 1973

Spec. Inq.

PAGE TWO

NH(161-1518)

EDUCATION:

AVON WORTH HIGH SCHOOL (THREE YEARS), BEN AVON, PA.

HOTCHKISS SCHOOL, LAKEVILLE, CONN., GRADUATED NINETEEN FORTYFOUR.

UNIVERSITY OF PITTSBURGH, SUMMER AND FALL SEMESTERS, NINETEEN FORTYFOUR.

UNIVERSITY OF CHICAGO, B.A., NINETEEN FORTYEIGHT WITH HONORS.

UNIVERSITY OF CHICAGO, J.D., NINETEEN FIFTYTHREE, PHI BETA KAPPA, ORDER OF COIF, AND LAW REVIEW AT UNIVERSITY OF CHICAGO.

MARITAL STATUS: MARRIED CLARE SARAH DAVIDSON JUNE FIFTEEN NINETEEN FIFTYTWO AT CHICAGO.

EMPLOYMENT:

NINETEEN FIFTYTHREE DASH FIFTYFOUR, RESEARCH ASSOCIATE, LAW AND ECONOMICS PROJECT, UNIVERSITY OF CHICAGO LAW SCHOOL.

NINETEEN FIFTYFOUR DASH FIFTYFIVE, WILLKIE OWEN FARR GALLAGHER AND WALTON, CHASE MANHATTAN PLAZA, NYC.

NINETEEN FIFTYFIVE DASH SIXTYTWO, KIRKLAND, ELLIS, HODSON, CHAFFETZ AND MASTERS (NOW KIRKLAND AND ELLIS), PRUDENTIAL

END PAGE TWO

PAGE THREE

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BUILDING, CHICAGO, ILLINOIS.

NINETEEN SIXTYTWO TO PRESENT, YALE UNIVERSITY LAW SCHOOL.

MILITARY SERVICE:

NINETEEN FORTYFIVE DASH FORTYSIX - USMCR, ENLISTED SERVICE.

NINETEEN FIFTY DASH FIFTYTWO, USMCR - OFFICER.

NEIGHBORHOODS:

PRIOR TO ATTENDING UNIVERSITY OF CHICAGO, DICKSON AVENUE,
BEN AVON, PENNSYLVANIA.

NINETEEN FIFTYTWO - FIFTYFIRST STREET AND WOODLAWN,
CHICAGO ILLINOIS.

NINETEEN FIFTYTHREE, TWENTYSEVEN PIERREPONT ST., BROOKLYN,
HEIGHTS, N.Y.

NINETEEN FIFTYFOUR - FIFTIETH STREET, MADISON PARK
APARTMENT, CHICAGO, ILLINOIS.

NINETEEN FIFTYFIVE DASH SIXTYTWO, CORNER WASHINGTON AND
VERNON STS., GLENCOE, ILLINOIS.

NINETEEN SIXTYTWO DASH SIXTYTHREE - HUMPHREY STREET
BETWEEN ORANGE AND WHITNET, NEW HAVEN, CONN.

NINETEEN SIXTYTHREE DASH SIXTYEIGHT - SIXTYONE HUNTINGTON ST.

END PAGE THREE

PAGE FOUR

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NINETEEN SIXTYEIGHT TO PRESENT - ONE FORTYTWO HUNTINGTON ST.,

REFERENCES:

ALEXANDER BICKEL, PROFESSOR, YALE LAW SCHOOL.

ABRAHAM GOLDSTEIN, DEAN, YALE LAW SCHOOL.

RALPH WINTER, PROFESSOR, YALE LAW SCHOOL.

ASSOCIATES:

WARD BOWMAN, PROFESSOR, YALE LAW SCHOOL.

DENNIS GARVEY, ATTORNEY, SEVEN CHURCH STREET, NEW HAVEN, CONN.

HAMMOND CHAFFETZ, PARTNER, KIRKLAND AND ELLIS, PRUDENTIAL
BUILDING, CHICAGO, ILLINOIS.

RELATIVES:

HARRY PHILLIP BORK, FATHER, UNIVERSITY TOWERS, NEW HAVEN,
CONN.

ELIZABETH MILDRED BORK, MOTHER, SAME AS ABOVE.

NO BROTHERS OR SISTERS.

CLAIRE SARAH BORK, NEE DAVIDSON, WIFE, DOB SEPTEMBER
SIXTEEN, NINETEEN THIRTY, ONE FORTYTWO HUNTINGTON ST., NEW
HAVEN, CONN.

b6
b7C

[REDACTED]
[REDACTED] SAME AS ABOVE.

END PAGE FOUR

PAGE FIVE

NH(161-1518)

[REDACTED]
[REDACTED] SAME AS ABOVE.
[REDACTED]

b6
b7C

SAME AS ABOVE.

ARRESTS:

NINETEEN FIFTYTHREE, CHICAGO, ILLINOIS, PARKING IN A BUS STOP. APPOINTEE ADVISED HE WAS TAKEN INTO CUSTODY WHEN HE TRIED TO INTERFERE WITH OFFICERS WHO WERE TOWING AWAY HIS VEHICLE. POSTED TWENTY DOLLAR BOND, NEVER WENT TO COURT.

APPOINTEE ADVISED HE IS A MEMBER OF THE NEW HAVEN LAWN CLUB, MONT PELERON SOCIETY, AMERICAN BAR ASSOCIATION, ILLINOIS BAR ASSOCIATION, AMERICAN ENTERPRISE INSTITUTE, ELEVEN FIFTY SEVENTEENTH STREET, N.W., WASHINGTON, D.C.

CHICAGO AND NEW HAVEN WILL INTERVIEW SELECTED CIVIL RIGHTS LEADERS AND REPRESENTATIVES OF THE RELIGIOUS COMMUNITY AS WELL AS FEDERAL, STATE, AND LOCAL JUDGES.

CHICAGO INTERVIEW EXECUTIVE DIRECTOR, AMERICAN BAR ASSOCIATION AT CHICAGO.

END PAGE FIVE

PAGE SIX

NH(161-1518)

CHICAGO AND NEW YORK WILL REVIEW MORGUE OF CHICAGO TRIBUNE
AND NEW YORK TIMES. COPIES OF ALL ARTICLES ARE TO BE FORWARDED
TO THE BUREAU BY AURTEL.

FOR WFO, BORK'S SSN IS TWO ZERO SEVEN - ONE EIGHT- THREE
SIX SEVEN FIVE.

RESULTS OF INVESTIGATION TO BE FURNISHED BUREAU ON A
CONTINUING BASIS VIA TELETYPE WITH REPORT TO FOLLOW.

END

HOLD

FBI VDM WASH DC

HOLD

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 12 1972

TELETYPE

NR001 NH PLAIN

3:32PM URGENT 12/13/72 VEM

TO: ACTING DIRECTOR

FROM: NEW HAVEN (161-1518) (P) 12PAGES

Mr. Felt	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. Dalbey	_____
Mr. Gebhardt	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, E.S.	_____
Mr. Purvis	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Ms. Herwig	_____
Mrs. Neenan	_____

MR. MARTIN
ROOM 1266

ROBERT HERON BORK, SI. BUDED: DEC. EIGHTEEN, NEXT, WITHOUT FAIL.

RE: BUREAU AIRTEL TO NEW HAVEN, DEC. ELEVEN, LAST.

EMPLOYMENT

THE FOLLOWING PERSONS WERE CONTACTED AT YALE UNIV. ON DEC.

TWELVE, LAST, BY SA [REDACTED]:

[REDACTED], SECRETARY, DEANS OFFICE, YALE LAW SCHOOL, ADVISED THAT THE APPOINTEE HAD BEGUN EMPLOYMENT AT THE LAW SCHOOL ON JULY ONE, SIXTY TWO, AS AN ASSOCIATE PROFESSOR OF LAW. ON JULY ONE, SIXTY FIVE, HE WAS PROMOTED TO A POSITION OF PROFESSOR OF LAW. HE CONTINUES TO BE EMPLOYED IN GOOD STANDING AND HIS SOCIAL SECURITY NUMBER IS TWO ZERO SEVEN DASH ONE EIGHT DASH THREE SIX SEVEN FIVE. [REDACTED] NOTED THAT SHE HAS HAD FREQUENT CONTACTS WITH THE APPOINTEE IN HER CAPACITY AS DEAN'S SECRETARY AND ADVISED THAT BORK IS ALWAYS CHEERFUL AND PLEASANT TO DEAL WITH AND THAT HE IS HIGHLY RESPECTED BY OTHER MEMBERS OF THE CLERICAL STAFF AT THE LAW SCHOOL FOR HIS CONSIDERATIONS AND HIS THOROUGHNESS. JAN 01 1973

[REDACTED] YALE LAW SCHOOL, ADVISED THAT HE HAS BEEN SO EMPLOYED FOR TWO YEARS AND PRIOR TO THAT HE HAD

58 FEB 05 1973

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PAGE TWO

ATTENDED YALE LAW SCHOOL FOR THREE YEARS. HE WAS THEREFORE FAMILIAR WITH THE APPOINTEE AS BOTH AN INSTRUCTOR AND A COLLEAGUE. HE ADDED THAT IN HIS CAPACITY AS ASSISTANT DEAN HE HAS WORKED FREQUENTLY WITH THE APPOINTEE ON VARIOUS PROJECTS. [] ADVISED THAT BORK'S CHARACTER IS ABOVE REPROACH. HE STATED THAT BORK IS HIGHLY REGARDED BY OTHER MEMBERS OF THE FACULTY AND IS RESPECTED FOR HIS VIEWS AND HIS INDIVIDUALITY. HE IS KNOWN AS A GOOD SCHOLAR AND A GOOD TEACHER.

[] NOTED THAT THE APPOINTEE'S VIEWS REGARDING CERTAIN PHASES OF THE LAW TENDED TO BE MORE CONSERVATIVE THAN THOSE OF THE MAJORITY OF THE PROFESSORS OF THE YALE LAW SCHOOL FACULTY WHICH IS KNOWN FOR IT'S LIBERALISM. [] WAS REFERRING TO BORK'S FREE ENTERPRISE APPROACH TO GOVERNMENT AND BUSINESS. HE ADDED, HOWEVER, THAT HE CONSIDERS IT A FURTHER INDICATION OF THE APPOINTEES ABILITY AND INTELLECT THAT HE CONTINUES TO ENJOY A HIGH REPUTATION ON THE FACULTY. [] ADDED THAT HE FEELS THE APPOINTEE'S LOYALTY IS ABOVE QUESTION AND ADVISED THAT HE WOULD GLADLY RECOMMEND HIM FOR GOVERNMENT EMPLOYMENT WITHOUT RESERVATION.

EUGENE V. ROSTOW, STERLING PROFESSOR OF LAW AND PUBLIC AFFAIRS, YALE LAW SCHOOL, ADVISED THAT HE WAS FAMILIAR WITH BORK'S WORK AT BOTH THE UNIV. OF CHICAGO AND IN PRIVATE PRACTICE AND THAT AS DEAN

END PAGE TWO

b6
b7C

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PAGE THREE

OF THE LAW SCHOOL IN NINETEEN SIXTY TWO HE HAD BEEN INSTRUMENTAL IN RECRUITING BORK TO YALE. HE ADVISED THAT HE KNOWS THE APPOINTEE PERSONALLY AND IS FAMILIAR WITH HIS FAMILY AND HIS BUSINESS LIFE. HE ADVISED THAT HE KNOWS OF NO DEROGATORY INFORMATION REFLECTING ON THE APPOINTEE'S CHARACTER OR HIS QUALIFICATIONS FOR GOVERNMENT EMPLOYMENT. [] ADVISED THAT HE WOULD GLADLY RECOMMEND BORK FOR EMPLOYMENT.

LOUIS H. POLLAK, PROFESSOR OF LAW, ADVISED THAT HE HAS KNOWN BORK SINCE NINETEEN SIXTY TWO AND THAT FROM NINETEEN SIXTY FIVE TO NINETEEN SEVENTY, HE SERVED AS DEAN OF THE LAW SCHOOL, AND THEREFORE WAS FREQUENTLY IN CONTACT WITH THE APPOINTEE. HE DESCRIBED BORK AS A TOP FLIGHT PROFESSOR, A SUPERB LAWYER, TEACHER AND COLLEAGUE. HE ADVISED THAT HE KNOWS THE APPOINTEE'S WIFE AND THREE CHILDREN PERSONALLY AND THAT THEY LIVE NEAR EACH OTHER IN NEW HAVEN, POLLAK ADVISED THAT BORK HAS A STERLING CHARACTER AND IS A FINE PERSON. HE ADDED THAT THE APPOINTEE IS A MAN OF HIGH INTEGRITY AND IS TRUSTWORTHY. POLLAK ADVISED THAT BORK WAS "THE BEST MAN IN THE WORLD TO ARGUE WITH". HIS ARGUMENTS ALWAYS WELL THOUGHTOUT AND INTELLIGENTLY PRESENTED.

HE ADVISED THAT BORK IS HIGHLY RESPECTED BY THE MEMBERS OF THE FACULTY AND STATED THAT HE COULD FURNISH NO INFORMATION WHICH WOULD
END PAGE THREE

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PAGE FOUR

DISQUALIFY HIM FOR GOVERNMENT EMPLOYMENT. POLLAK ADDED THAT HE FELT BORK WAS AN OUTSTANDING PERSON AND GLADLY RECOMMENDED HIM.

MYRES S. MC DOUGAL, STERLING PROFESSOR OF LAW, YALE LAW SCHOOL, ADVISED THAT HE HAS KNOWN APPOINTEE SINCE NINETEEN SIXTY TWO AS A FELLOW COLLEAGUE. MC DOUGAL ALSO DESCRIBED BORK IN FAVORABLE TERMS AS ABOVE, ADDING THAT HE FELT BORK TO BE AN IDEAL CHOICE FOR THE JOB AS HE WAS A SUPERLATIVE MAN, A FINE LAWYER WITH GREAT WISDOM, AND THAT HE WOULD BRING A WELL TRAINED MIND TO THE OFFICE. HE ADDED THAT BORK IS HIGHLY AND AFFECTIONATELY REGARDED BY THE COLLEAGUES AT THE LAW SCHOOL AND HIGHLY RECOMMENDED HIM.

JOSEPH W. BISHOP, JR., ELY PROFESSOR OF LAW, YALE LAW SCHOOL, ADVISED THAT HE HAS KNOWN THE APPOINTEE SINCE NINETEEN SIXTY TWO AND ALSO FURNISHED A FAVORABLE ENDORSEMENT CONCLUDING WITH HIS HIGHEST RECOMMENDATION FOR GOVERNMENT EMPLOYMENT.

CHARLES L. BLACK, JR., LUCE PROFESSOR OF JURISPRUDENCE, ADVISED THAT HE HAS KNOWN THE APPOINTEE FOR OVER TEN YEARS AND THAT HE WAS ON OF THOSE FACULTY MEMBERS WHO WORKED TO BRING THE APPOINTEE TO YALE. BLACK ADVISED THAT HE KNOWS THE APPOINTEE'S FAMILY AND CHILDREN AND THAT HE IS A CLOSE PERSONAL FRIEND AND COLLEAGUE. BLACK ADVISED THAT HE HAS NEVER KNOWN A MORE HONEST AND RELIABLE MAN.

END PAGE FOUR

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PAGE FIVE

IN DESCRIBING THE APPOINTEE'S POLITICS WHICH HE SAID WERE OFTEN CONTRARY TO HIS OWN, BLACK STATED THAT THE APPOINTEE TENDED TO HOLD TO THE EXTREME FREE ENTERPRISE POINT OF VIEW. HE STATED THAT IN ARGUING THEIR RESPECTIVE POSITIONS THEIR DISCUSSIONS HAVE ALWAYS BEEN REASONABLE AND AMIABLE AND THAT HE HAD GREAT RESPECT FOR BORK'S INTELLECT AND THAT BORK HAD ALWAYS TAKEN A SCHOLARLY APPROACH. HE ADVISED THAT ON NO^T OCCASION TO HIS KNOWLEDGE HAS THE APPOINTEE'S PERSONAL BELIEFS ALIENATED ANY OF HIS COLLEAGUES IN ANY WAY. HE GLADLY GAVE BORK HIS HIGHEST RECOMMENDATION.

HARRY H. WELLINGTON, PROFESSOR OF LAW, YALE LAW SCHOOL, ADVISED THAT HE HAS KNOWN THE APPOINTEE FOR OVER TEN YEARS AND FOR A TIME AS THE APPOINTEE'S NEXT DOOR NEIGHBOR ON HUNTINGTON ST. HE ALSO DESCRIBED THE APPOINTEE IN FAVORABLE TERMS INDICATING FURTHER THAT BORK HAD A SPLENDID CHARACTER, HE WAS PRINCIPLED AND HONEST. HE ADDED THAT BORK ENJOYED AN EXCELLENT REPUTATION AMONG HIS FACULTY COLLEAGUES AND WAS A VERY POPULAR TEACHER. HE RECOMMENDED HIM FOR EMPLOYMENT.

REFERENCES

ALEXANDER M. BICKEL, PROFESSOR OF LAW, YALE LAW SCHOOL, ADVISED THAT HE HAS KNOWN THE APPOINTEE FOR TEN YEARS AS A COLLEAGUE AND AS
END PAGE FIVE

PAGE SIX

AN INTIMATE FRIEND. HE ADVISED THAT HE ALSO KNOWS THE APPOINTEE'S FAMILY AND THAT THEY BELONG TO THE SAME NEW HAVEN LAWN CLUB. BICKEL HAD IN FACT SPONSORED BORK TO THIS LAWN CLUB WHICH HE DESCRIBED AS A TENNIS AND SWIMMING CLUB IN DOWNTOWN NEW HAVEN. BICKEL ADVISED THAT HE BELIEVES THE APPOINTEE'S CHARACTER IS UNEQUIVOCABLE AND THAT HE IS HONEST, TRUSTWORTHY AND HONORABLE. HE ADDED THAT HE FEELS BORK IS A STRONG MAN AND THAT HE REGARDED HIM AS A VERY GOOD FRIEND.

BICKEL STATED THAT BORK WAS ACTIVE ON THE FACULTY AND WAS HIGHLY RESPECTED AS A SCHOLAR AND INSTRUCTOR. BICKEL NOTED THAT TO THE BEST OF HIS KNOWLEDGE, BORK'S LOYALTY IS ABOVE QUESTION. HE ADDED THAT BORK WAS "STILL A MARINE AT HEART." BICKEL GLADLY GAVE THE APPOINTEE HIS ABSOLUTELY HIGHEST RECOMMENDATION.

ABRAHAM S. GOLDSTEIN, DEAN, YALE LAW SCHOOL, ADVISED THAT HE HAS BEEN DEAN OF THE LAW SCHOOL FOR OVER TWO AND A HALF YEARS AND HAS BEEN ON THE FACULTY SINCE NINETEEN FIFTY SIX. HE HAS KNOWN THE APPOINTEE SINCE NINETEEN SIXTY TWO AND REGARDS HIM AS A CLOSE PERSONAL FRIEND. HE DESCRIBED BORK AS A MAN OF GREAT PRINCIPLE AND INTEGRITY AND ADVISED THAT HE IS HIGHLY REGARDED

END PAGE SIX

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PAGE SEVEN

VIGOROUS STRONG MINDED MAN. HE NOTED THAT BORK'S POWERFUL INTELLECT AND WELL THOUGHT AND PRESENTED ARGUMENTS WERE ALWAYS A PART OF HIS VIEWS ON POLITICS. THE DEAN NOTED THAT BORK HAS ALWAYS PROVIDED BALANCE IN HIS VIEWS OF THE YALE CAMPUS AND THAT HE WILL BE SORELY MISSED ON THE FACULTY. GOLDSTEIN STATED THAT HE HAS NO REASON TO QUESTION BORK'S LOYALTY AND NOTING THAT HE HAD PREVIOUSLY RECOMMENDED BORK'S APPOINTMENT TO THE CIRCUIT COURT, HE GLADLY GAVE HIS HIGHEST RECOMMENDATION.

RALPH K. WINTER, JR., PROFESSOR OF LAW, YALE LAW SCHOOL. ADVISED THAT HE HAS KNOWN BORK SINCE NINETEEN SIXTY TWO AS A COLLEAGUE OF THE LAW SCHOOL. HE DESCRIBED HIM AS AN EXCELLENT INSTRUCTOR AND RESEARCHER. WINTER ADVISED THAT HE COULD NOT STATE ANY UNFAVORABLE TRAITS IN APPOINTEE'S CHARACTER. WINTER NOTED THAT HE AND THE APPOINTEE WERE CLOSE FRIENDS AND THAT THEIR FAMILIES HAD FREQUENTLY STAYED TOGETHER ON VACATIONS. WINTER NOTED THAT BORK WAS HIGHLY RESPECTED ON THE FACULTY AND WAS WELL LIKED BY HIS STUDENTS. HE WAS UNAWARE OF ANY PERSONAL CRITICISM AGAINST BORK.

WINTER ADDED THAT BORK HAD BEEN AN EXTREMELY SUCCESSFUL AND BRILLIANT PRACTITIONER BEFORE COMING TO YALE, AND
END PAGE SEVEN

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PAGE EIGHT

HE, WINTER, GAVE HIM HIS HIGHEST RECOMMENDATION.

ASSOCIATES:

WARD S. BOWMAN, JR., PROFESSOR OF LAW AND ECONOMICS, YALE LAW SCHOOL, ADVISED THAT HE HAS KNOWN THE APPOINTEE SINCE HE WAS A STUDENT AT THE UNIV. OF CHICAGO LAW SCHOOL AND WORKED WITH HIM WHEN HE WAS EMPLOYED BY THE UNIV. OF CHICAGO LAW SCHOOL AS A RESEARCH ASSOCIATE. THEY HAD IN FACT WORKED TOGETHER ON THE SAME GENERAL PROJECT. HE DESCRIBED BORK'S WORK IN THIS CAPACITY AS BRILLIANT THOROUGH AND WELL-RESEARCHED.

BOWMAN ADVISED THAT HE KNOWS THE APPOINTEE'S FAMILY PERSONALLY AND THAT HE WAS INSTRUMENTAL IN BRINGING BORK TO YALE. THEY HAVE WRITTEN JOINTLY ON SEVERAL OCCASIONS AND BOWMAN FEELS THAT HE KNOWS THE APPOINTEE BETTER THAN ANY OTHER FACULTY MEMBER.

BOWMAN DESCRIBED THE APPOINTEE AS A MAN OF HIGH INTELLECT AND STRONG CHARACTER. HE ADVISED THAT BORK IS A STAUNCH DEFENDER OF CONSTITUTIONAL PRINCIPLES AND THAT HE TENDED TO BE CAREFUL AND REASONING IN HIS APPROACH TOWARD LEGAL PRINCIPLES AFFECTING BUSINESS WHICH HAVE BEEN DISCUSSED AT YALE. FOR THIS REASON SOME HAVE LABELED THE APPOINTEE A "CONSERVATIVE". HOWEVER, BOWMAN FEELS THIS MAY BE A MISNOMER SINCE THE APPOINTEE IS A LIBERAL IN HIS THINKING

END PAGE EIGHT

AS ANY OTHER PROFESSOR.

BOWMAN STATED THAT BORK HAS SERVED TWO HITCHES IN THE USMC AND ADDED THAT HIS LOYALTY IS ABOVE QUESTION. HE GLADLY GAVE HIM HIS HIGHEST RECOMMENDATION.

MISCELLANEOUS

THE FOLLOWING ITEMS WERE OBTAINED FROM THE LIBRARY OF THE NEW HAVEN REGISTER AT NEW HAVEN CT., FURNISHED BY [REDACTED]:
COPIES WILL BE FORWARDED TO THE BUREAU IN FOLLOWING AIRTEL.

b6
b7C

ON AUGUST NINETEEN, SIXTY FOUR, THE NEW HAVEN REGISTER CARRIED AN ARTICLE ENTITLED: " YALE PROFESSOR IN PANEL CONFERRING WITH BARRY" THE ARTICLE, DATE LINED WASHINGTON, NOTED THAT THE APPOINTEE WAS AMONG A GROUP OF THIRTEEN COLLEGE PROFESSORS CONFERRING PRIVATELY WITH REPUBLICAN NOMINEE BARRY GOLDWATER ABOUT MAJOR ISSUES IN THE CAMPAIGN AHEAD.

ON MAY THIRTEEN, SIXTY FIVE, BORK WAS ONE OF THREE PROFESSORS LISTED AS HAVING BEEN NAMED TO LAW SCHOOL PROFESSORSHIP AT YALE.

ON MAY FOUR, SEVENTY, THE NEW HAVEN REGISTER CARRIED AN ARTICLE ENTITLED: " RADICAL RIGHT LESS DANGEROUS, PROFESSORS CALL NEW LEFT TOTALLITARIAN". THE ARTICLE SUMMARIZED THE STATEMENTS OF APPOINTEE AND RALPH K. WINTER, JR., WHO SPOKE ON A WEEKLY RADIO PROGRAM OVER
END PAGE NINE

PAGE TEN NH 161-1518

STATION WTIC IN HARTFORD, CT. IN THIS BROADCAST, THE APPOINTEE AND HIS COLLEAGUE TAKE NEW LEFT TO TASK FOR ITS "WILLINGNESS TO USE VIOLENCE AGAINST THE MAJORITY OF SOCIETY" AND ITS LACK OF CONCERN WITH DEMOCRATIC PROCESSES. BORK WENT ON TO STATE THAT HE FELT THAT THE FREE MARKET WOULD BE THE SOLUTION TO THE PROBLEMS OF THE MINORITIES IN THAT THEY WERE ABLE TO ENTER IN TO AND BID FOR JOBS, ETC. HE OBJECTED THEREFORE TO THE ENTRANCE OF GOVERNMENT INTO THE FREE MARKET UNDER WHICH CIRCUMSTANCE "BIAS IS ENFORCED THROUGH LAW AND IS A COMPLETE BAR."

ON MARCH TWENTY ONE, SEVENTY TWO, THE REGISTER CARRIED TWO ARTICLES BOTH FEATURING A PHOTOGRAPH OF APPOINTEE, ONE ENTITLED "NEXT TRY TO BE MADE BY YALE'S PROF BORK", THE SECOND, "LEGISLATURE IN TURMOIL OVER JUDGES-BORK TO BEGIN IMMEDIATELY". IN SUMMARY BOTH ARTICLES INDICATED THAT THE APPOINTEE HAD BEEN NAMED BY A THREE JUDGE FEDERAL PANEL AS A "SPECIAL MASTER" TO FORMULATE A NEW RE-DISTRICTING PLAN THAT WOULD CONFORM TO CONSTITUTIONAL REQUIREMENTS. ^{THE FORMER RE} 5#3 194.34 43-DISTRICTING PLAN HAD BEEN STRUCK DOWN EARLIER THAT DAY FOR HAVING CREATED DISTRICTS WITH "HIGHLY IRREGULAR AND BAZZAR OUTLINES."

ON MAY ELEVEN, SEVENTY TWO, UNDER THE HEADING, "YALE PROFESSOR
END PAGE TEN

PAGE ELEVEN NH 161-1580

WARNS", "COLLEGES MUST SHUN POLITICAL LEADERSHIP". THE APPOINTEE WAS QUOTED AS ADVISING THAT UNIVERSITIES WHICH TRY TO ASSUME POLITICAL LEADERSHIP, FACE DANGER OF DESTROYING THEMSELVES AS CENTERS FOR RESEARCH AND REASON. BORK WAS DESCRIBED AS "LASHING OUT AT THE NEW LEFT FOR SEEMING TO HAVE "A NAKED DESIRE TO SMASH THINGS AND SYSTEMS FOR THE SHEER PLEASURE OF SMASHING." BORK WAS QUOTED FROM HIS RADIO BROADCAST OVER WTIC IN HARTFORD, CT. -

ON DECEMBER NINE, NINETEEN SEVENTY TWO, INFORMATION REGARDING BORK'S APPOINTMENT BY THE PRESIDENT TO THE POSITION OF US SOLICITOR GENERAL, WAS ANNOUNCED IN THE NEW HAVEN REGISTER.

[REDACTED], NEW HAVEN CHAPTER, NAACP, ADVISED ON DEC. TWELVE, LAST, THAT HE IS NOT PERSONALLY ACQUAINTED WITH BORK BUT HAS SEEN HIM ON OCCASION AT LOCAL CIVIC FUNCTIONS. HE SAID HE POSSESSES NO INFORMATION WHICH WOULD PRECLUDE HIM FROM RECOMMENDING BORK FOR A POSITION WITH THE US GOVERNMENT.

[REDACTED], NEW HAVEN COUNTY, NEW HAVEN CT., ADVISED ON DEC. TWELVE, LAST, HE HAS KNOWN BORK SOCIALLY FOR ABOUT TWO YEARS. HE SAID HE CONSIDERS BORK TO BE A BRILLANT SCHOLAR AND POSSESSOR OF AN OUTSTANDING LEGAL MIND. HE HAS FOUND HIM TO BE A FAIRMINDED, HONEST, AND COMPLETELY TRUSTWORTHY

END PAGE ELEVEN

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b7C

NH(161-1518)

PAGE TWELVE

M

INDIVIDUAL, WHOSE APPOINTMENT TO A FEDERAL GOVERNMENT POSITION
WOULD BE A FINE ASSET TO THE COUNTRY.

END

JDJ FBI WAS DC CLR

FOR TWO

F B I

Date: 12/13/72

Transmit the following in _____
(Type in plaintext or code)Via AIRTEL _____
(Priority)

ST
TO: ACTING DIRECTOR, FBI
FROM: SAC, NEW HAVEN (161-1518) (P)
SUBJECT: ROBERT HERON BORK
SPECIAL INQUIRY
BUDED: 12/18/72

RE: New Haven teletype to the Bureau, 12/13/72.

Enclosed for the Bureau are 2 copies each of duplicates of newspaper articles acquired from the morgue of the "New Haven Register", New Haven, Conn.

New Haven investigation continuing.

1cc
2-Bureau (Encls. 7)
2-New Haven
RHG/jhk
(4)

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ENCLOSURE

ENCLOSURE ATTACHED

161-9206-5
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Spec. Inv.

Approved: _____

58 FEB 5 1973

Special Agent in Charge

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Per _____

(Mount Clipping in Space Below)

Radical Right Less Dangerous**Professors Call New Left Totalitarian**

Two Yale Law School professors Sunday night declared that the New Left appears to be "predominantly totalitarian," because its "willingness to use violence against the majority of society indicates that they are not concerned with democratic processes so much (as) with their own results."

However, they added, the Radical Right "wants government to help it to impose racist or other kinds of policy."

Robert H. Bork and Ralph K. Winter Jr., professors of law at Yale, spoke on the weekly radio program "Yale Reports." They discussed "The Conservative Response" in the first of a two-part series to be broadcast over station WTIC in Hartford.

"The values of the New Left are not at all clear except a profound belief that society as it now exists is terrible and

must somehow be destroyed," said Prof. Winter. "With the New Left, I think it's fair to say that freedom really has very little weight, and, carried to its logical end, totalitarianism would become inevitable."

The Radical Rightists "are arbitrarily called conservatives by some others," he said, but "I would regard the Radical right as considerably less dangerous than the New Left because there is, as yet, no sign that it has any desire or will to destroy society — and it seems quite willing to try and work through the political process. However, deplorable it would be if it were successful."

Prof. Bork agreed that the "right wing is simply not a strong force in American society, although we keep frightening ourselves with talk about right wing reactions."

"A good example of freedom

under the free market is how minorities make out in a free enterprise system," said Winter. "No matter how much bias may exist in the populace against a minority, the market gives economic incentive to act somewhat at least as a neutralizing force."

"Consumers don't usually care who produced the product they are going to buy. Minority persons are free to enter and bid for jobs and the like. Where the government enters the market, however, bias is enforced through law and is a complete bar."

South Africa and southern United States' schools, he said, "are examples of what happens when government runs an activity. It's under cases like that, and under socialism (that) minorities can be excluded completely because the government is running everything."

(Indicate page, name of newspaper, city and state.)

New Haven Register

P. 32

Date: *5/4/70*
Edition:
Author:
Editor:
Title:

(Mount Clipping in Space Below)

Yale Names 3 To Law School Professorships

Three members of the Yale Law School faculty have been promoted to professor of law, it was announced Wednesday by Charles H. Taylor, university provost. *5-13-65*

The promotions are effective July 1. The three men, now associate professors, are: Robert H. Bork, Ronald M. Dworkin, and Robert B. Stevens.

Prof. Bork is a specialist in anti-trust laws. He was a research associate in Law and Economics at the University of Chicago Law School of 1953-1954, after which he practiced law privately. In 1962 he joined the Yale Law School faculty, as an associate professor.

He lives at 61 Huntington St.

Prof. Dworkin's main field of interest is conflict of laws. He served as law clerk to Judge Learned Hand of the Second Circuit Court of Appeals (1957-1958) and was associated with the firm of Sullivan and Cromwell in New York City from 1958 to 1961, working largely in the international area.

He was appointed an associate professor at Yale's Law School in 1962, and taught a course in the philosophy of law at Princeton during the spring term of 1963-1964.

He lives at 8 St. Ronan Ter.

Prof. Stevens, a native of England, was a barrister-at-law of Gray's Inn and the Midland Circuit in 1956, a teaching fellow at Northwestern University in 1956-1957, and a tutor in law at Keble College, Oxford, in 1958-1959. He joined the Yale Law School faculty as an assistant professor in 1959 and was promoted to associate professor in 1961. He is an authority on property laws. He lives at 15 Edgehill Road.

(Indicate page, name of newspaper, city and state.)

NH REGISTER

Date: *5-13-65*

Edition:

Author:

Editor:

Title:

Character:

or

Classification:

Submitting Office:

☐ Being Investigated

(Mount Clipping in Space Below)

Yale Professor In Panel Conferring With Barry

8-19-64
WASHINGTON (Special) — A Yale faculty member, associate professor of law Robert H. Bork, was among a group of 13 college professors who conferred privately here Tuesday with Republican presidential nominee Barry Goldwater about major issues likely to come up in the campaign ahead.

Bork declined to comment on specific comments but said the meeting was "perhaps an effort" to demonstrate that Goldwater has some support from intellectuals. Bork said he supports the GOP candidate and believes "there are a great many more" in the academic community who do so.

Goldwater aides said the meeting was off the record but added that Goldwater did indicate he wants to define campaign issues "with all possible precision so that the American people will have a clear choice in November."

(Indicate page, name of newspaper, city and state.)

NH. REGISTER

Date:

8-19-64

Edition:

Author:

Editor:

Title:

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or

Classification:

Submitting Office:

☐ Being Investigated

Legislature In Turmoil Over Judges

Bork To Begin Immediately

By STANLEY FISHER JR.

Register Staff Reporter

Yale Law Professor Robert H. Bork said today he will begin work immediately on the fourth attempt to provide the state with an equitable redistricting plan.

The 45-year-old instructor of constitutional and anti-trust law has been appointed a "special master" to draw up a constitutional redistricting plan by a three-judge federal panel.

In announcing Bork's appointment Thursday, the panel also ruled unconstitutional the third attempt—by a panel of three state court judges—to realign Connecticut General Assembly districts for the November balloting.

The state judges were precluded, unsuccessfully, by the Assembly and a special state commission.

In the meantime, legislators still don't know where or how long they will have to campaign. Bork couldn't tell them today. He said he had "no idea" how long it would take him to come up with a new plan, but would "work as fast as I can."

He will proceed despite the threat of an appeal of the federal panel's ruling Thursday.

The federal panel will have final approval of whatever plan Bork comes up with. The judges said they will institute his product if acceptable, unless the Assembly draws up one. Bork said that the federal panel has the

last say. "Federal law is supreme . . . you can only appeal," he said.

Bork added that, although he will be in communication with the federal panel, he will work alone on the project. He said that he had seen the state judges' plan and read the federal panel's decision in striking it down, but wouldn't comment on either.

A Republican, Bork said he didn't know how he came to be selected for his new job and that he didn't know any of the three judges that picked him. His payment for the job is still unknown, he said.

Bork is on a semester's leave from Yale to work on a book.

See BORK Page 2



Yale law professor Robert H. Bork will start at once drawing up a new General Assembly reapportionment plan.

almost completed. He will drop that task to work on the redistricting plan. A teacher at Yale since 1962, he will return to his classroom in September.

He holds a law degree from the University of Chicago and practiced law there. He and his wife and three children live at 142 Huntington Ave.

NH Register
3/21/72

7-21-72

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Nixon Names Yale's Bork To Law Post

Yale Law School Prof. Robert H. Bork was among those nominated for top governmental positions Friday by President Nixon.

Prof. Bork was named to succeed retiring U.S. Solicitor Gen. Erwin N. Griswold, who will remain until the current Supreme Court term ends.

Prof. Bork has taught at Yale since 1962. He was a consultant to the Nixon Cabinet committee which developed the administration's position against forced busing of school children to achieve racial integration.

Prof. Bork also earlier this year was the man assigned to play a role as General Assembly mapmaker when negotiations for redistricting of the assembly broke down. The Bork plan was subsequently shelved in a series of court appeals taken by both political parties.

"He's the lawyer in charge of all the business the United States has in the U.S. Supreme Court," he said.

"It is a superb appointment," Pollak said. "Solicitor General is every lawyer's dream job. It particularly calls for someone with a sense for public law."

The 45-year-old Bork, a native of Pittsburgh, joined the Yale law faculty as an associate professor in 1962 and was promoted to a full professorship in 1965. He will most likely take a leave of absence from Yale, Pollak said, calling Bork a man of "tremendous intelligence... (who) follows the truth wherever it takes him."

Recognized as a specialist in anti-trust law and related subjects such as monopolies, regulation of business and business law, Bork widened his field to include constitutional law while at Yale.

"He has written very widely on constitutional problems," Pollak said, noting that Bork first went to Yale when former Undersecretary of State Eugene Rostow was dean.

Bork helped shape the Nixon administration's busing strategy.

"He's one of the foremost constitutional law teachers and scholars in the country," Pollak said.

In March, Bork, a Republican, was appointed by a three-judge federal panel to write a reapportionment plan for the Connecticut General Assembly. It never took effect because the U.S. Supreme Court ordered another plan into law, temporarily settling the confusion surrounding legislative reapportionment and allowing General Assembly elections on Nov. 7.

Not known particularly as a political activist among his peers at Yale, Pollak did say that Bork was one of the signers of a published advertisement during the fall supporting the re-election of President Nixon.

Bork served in the U.S. Marine Corps in 1945-46 and was recalled to serve in 1950-52.

He attended the University of Pittsburgh but received his B.A. and J.D. (doctor of jurisprudence) degrees from the University of Chicago in 1953. He remained there for a year to work on an economics and law project before joining a private law firm in New York City and in Chicago.

He and his wife, Clare, have three children. The Borks live in New Haven.



PROF. ROBERT H. BORK

(Indicate page, name of newspaper, city and state.)

NH REGISTER

Date:

Edition:

Authors:

Editors:

Title:

Character:

or

Classification:

Submitting Office:

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(Mount Clipping in Space Below)

Next Try To Be Made By Yale's Prof. Bork

By GARY E. SWAN

Journal-Courier Staff Reporter
A Yale law professor, who took a semester leave from the ivy halls to write a book, has suddenly been cast in the role of mapmaker in the states redistricting struggle.

Robert H. Bork, 45, Thursday was named by a three-judge federal panel as a "special master" to formulate a new redistricting plan that conforms to constitutional requirements.

"I was within two weeks of completing the book when this matter came up", the bearded Bork said Thursday night. "I'm going to start work right away," he added of his new job, indicating that the book—on antitrust law—may have to be delayed for a while.

Bork explained that he was



ROBERT H. BORK

The book must wait

The redistricting plan struck down earlier in the day had created districts with "highly irregular and bizarre outlines," the judges said, thereby violating the 14th amendment to the U.S. Constitution.

Questioned as to his opinion of the current trend of federal courts in state reappointment matters, Bork remained "non-committal at least for the present."

Decisions such as the present one striking down the state's legislative reappointment have been commonplace since the mid-1960's.

informed of his selection Wednesday but had known "that it was in the works for some time."

He discounted politics as having anything to do with the choice. The reapportionment issue in the state has been debated almost strictly along political lines.

"I'm a registered Republican, but I'm not involved in politics and I'm not going to get involved in politics," he said. The federal panel which appointed Bork included two Republican judges.

"I'd gladly disclose the salary they're going to pay me for my efforts," said Bork. "But the simple truth is it's never been discussed."

Bork has been an instructor in constitutional and antitrust law at Yale since 1962. He holds a law degree from the University of Chicago and formerly practiced law in that city. He and his wife and three children live at 142 Huntington Ave.

His new position will not take him away from Yale or his family, Bork indicated.

"I expect to be back teaching at Yale in September," he said, adding that most of the redistricting plans that he comes up with will be conceived in his "home office." J-31, 72

Bork emphasized, however, that whatever plans he drafts must be approved by the court before going into effect.

"I'm working for the court," he said. "I'm not going to rearrange the state of Connecticut all by myself."

(Indicate page, name of newspaper, city and state.)

NH REGISTER

Date:

3-21-72

Edition:

Author:

Editor:

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Character:

or

Classification:

Submitting Office:

☐ Being Investigated

(Mount Clipping in Space Below)

Yale Professor Warns:

Colleges Must Shun Political Leadership

Universities which try to assume political leadership face the danger of destroying themselves as centers "for research and reason," Robert H. Bork, Yale professor of law, warned Sunday night.

He also hailed President Nixon's intention of finding strict constructionists to sit on the Supreme Court as a move to locate "the power to govern" increasingly "in the legislature rather than the court."

A leading exponent of the conservative viewpoint, Prof. Bork held special task-force appointments for the Republican presidential candidates in 1964 and 1968.

He lashed out at New Leftists for seeming to have "a naked desire to smash things and systems for the sheer pleasure of smashing" at a time when "our society is improving very rapidly in terms of total wealth, in

terms of distribution of wealth, in terms of personal freedoms (from) governmental regulation and social pressure."

Prof. Bork was speaking with Ralph K. Winter Jr., also a professor of law at Yale, on the weekly radio program "Yale Reports." Their discussion was the second of two parts on "The Conservative Response," and was broadcast over station WTIC in Hartford.

"For some historical or sociological reason I don't quite understand, universities and academicians have been far to the left of American society in recent generations," said Prof. Bork.

"But more worrisome than the effect of academics on the society is the effect that the political action of the universities is having upon the universities themselves. There is an increasing demand that the uni-

versity abandon its traditional role, which is one of analysis, systematic accumulation of theory, of knowledge, and that it move instead actively into the political mainstream, usually in a left wing posture."

He declared that "universities are far too weak to play any direct role. The society is not going to take its lead from university politicians. So the university will probably have no real impact and might destroy itself as a center for research and reason in the process."

Prof. Winter said, "It's not at all clear to me why academics should play a terribly great role in the politics of the day. I don't see any particular reason why they have much to add as to government policies in the short run, being persons presumably dedicated to research and scholarship."

(Indicate page, name of newspaper, city and state.)

NH REGISTER

Date: 5-11-72
Edition:
Author:
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Submitting Office:
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TELETYPE

F B I

Date: 12/13/72

Transmit the following in PLAINTEXT
(Type in plaintext or code)Via TELETYPE URGENT
(Priority)

02

TO: BUREAU (AIRMAIL)
SAC, PHILADELPHIA

FROM: SAC, PITTSBURGH (161-982) (P)

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ROBERT HERON BORK, SPIN, BUDED: DECEMBER EIGHTEEN, NEXT.
WITHOUT FAIL.

RE BUREAU TELETYPE TO PITTSBURGH DATED DECEMBER TWELVE,
LAST.

FOR INFORMATION PHILADELPHIA, WHITE HOUSE HAS REQUESTED
EXPEDITE INVESTIGATION OF BORK, WHO IS BEING CONSIDERED FOR
PRESIDENTIAL APPOINTMENT, POSITION NOT STATED. BORK BORN MARCH
ONE, NINETEEN TWENTYSEVEN, AT PITTSBURGH, PA.; FATHER, HARRY
PHILLIP BORK; MOTHER, ELIZABETH MILDRED BORK, MAIDEN NAME
UNKNOWN TO PITTSBURGH.

of

PHILADELPHIA AT HARRISBURG, WILL AT PENNSYLVANIA BUREAU
OF VITAL STATISTICS VERIFY BIRTH OF BORK.

RESULTS OF INVESTIGATION TO BE FURNISHED BUREAU ON A
CONTINUING BASIS VIA TELETYPE WITH REPORT TO FOLLOW.

RAO/msl

(1) msl

1-Bureau (Airmail)

TELETYPE

161-9206-6
NOT RECORDED
16 DEC 15 1972

— ~~SLC-1001~~

Approved: 58 FEB 13 1973

Special Agent in Charge

Sent

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Per

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Date: 12/13/72

Transmit the following in PLAINTEXT
(Type in plaintext or code)Via TELETYPE URGENT
(Priority)

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TO : ACTING DIRECTOR, FBI (MAIL); AND SAC, LOS ANGELES
FROM: SAC, CHICAGO (161-2424)

ROBERT HERON BORK, SPECIAL INQUIRY, BUDED DECEMBER
EIGHTEEN NEXT WITHOUT FAIL.

RE BUREAU TELETYPE DECEMBER ELEVEN LAST, AND NEW
HAVEN TELETYPE DECEMBER TWELVE LAST. NO COPY TO LOS ANGELES.

WHITE HOUSE HAS REQUESTED EXPEDITE INVESTIGATION
OF BORK WHO IS BEING CONSIDERED AS DEPUTY SOLICITOR
GENERAL OF UNITED STATES.

BORN MARCH ONE NINETEEN TWENTY-SEVEN, PITTSBURGH,
PENNSYLVANIA, AND RESIDES NEW HAVEN, CONNECTICUT, WHERE
SINCE NINETEEN SIXTY-TWO HAS BEEN PROFESSOR OF LAW AT
YALE UNIVERSITY. BORK DID SPECIAL POST GRADUATE IN LAW
AND ECONOMICS AT UNIVERSITY OF CHICAGO NINETEEN FIFTY-THREE
TO FIFTY-FOUR UNDER AARON DIRECTOR. DIRECTOR PRESENTLY
RESIDES TWO SEVEN SIX THREE ZERO VIA CERRO GORDO, LOS ALTOS
HILLS, CALIFORNIA.

of

LOS ANGELES INTERVIEW DIRECTOR REGARDING BORK NOT RECORDED

① - Bureau (AM)

23 DEC 15 1972

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Approved: RKM/RK

Sent 1321P

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Per [Signature]

Special Agent in Charge

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 13 1972

TELETYPE

NR 019 LA PLAIN

5:53PM URGENT 12-13-72 NJZ

TO ACTING DIRECTOR

CHICAGO (161-2424)

SAN FRANCISCO

FROM LOS ANGELES (161-2272) (RUC) 2P

ROBERT HERON BORK, SPECIAL INQUIRY, BUDED DECEMBER
EIGHTEEN NEXT WITHOUT FAIL.

RE CHICAGO TELETYPE TO LOS ANGELES, DECEMBER THIRTEEN
INSTANT, NO COPY SAN FRANCISCO.

REFERENCED TELETYPE SET FORTH BELOW FOR LOS ANGELES.
FOR INFORMATION CHICAGO, LOS ALTOS HILLS COVERED BY SAN FRANCISCO.

WHITE HOUSE HAS REQUESTED EXPEDITE INVESTIGATION OF BORK
WHO IS BEING CONSIDERED AS A DEPUTY SOLICITOR GENERAL OF
UNITED STATES. BORN MARCH FIRST TWENTY SEVEN AT PITTSBURGH,
PENNSYLVANIA, AND RESIDES NEW HAVEN, CONNECTICUT, WHERE
SINCE SIXTY TWO HAS BEEN PROFESSOR OF LAW AT YALE UNIVERSITY.
END PAGE ONE

Mr. Felt	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. DeLoach	_____
Mr. Mohr	_____
Mr. Bishop	_____
Mr. Casper	_____
Mr. Callahan	_____
Mr. Conrad	_____
Mr. Felt	_____
Mr. Gale	_____
Mr. Rosen	_____
Mr. Sullivan	_____
Mr. Tavel	_____
Mr. Trotter	_____
Tele. Room	_____
Mr. Holmes	_____
Mr. Gandy	_____

MARTIN
ROOM 1236

[Handwritten signature]

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161-9206-8

RECORDED
JAN 31 1973

137
58 FEB 5 1973

Sp/M Inq

PAGE TWO

LA 161-2272

BORK DID SPECIAL POST GRADUATE IN LAW AND ECONOMICS AT
THE UNIVERSITY OF CHICAGO IN FIFTY THREE AND FIFTY FOUR
UNDER AARON DIRECTOR. DIRECTOR PRESENTLY RESIDES TWO SEVEN
SIX THREE ZERO VIA CERRO GORDO, LOS ALTOS HILLS, CALIFORNIA.

SAN FRANCISCO HANDLE.

RUC.

END

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 18 1972

TELETYPE

NR002 PLAIN

3:25PM URGENT 12/13/72 EM

TO: ACTING DIRECTOR, FBI, CHICAGO, RICHMOND AND WFO

ST
n FORM: NEW HAVEN, (161-1518) (P)

ROBERT HERON BORK, SI, BUDED; DEC. EIGHTEEN, NEXT, WITHOUT FAIL.

RE: BUREAU TELETYPE, DEC. ELEVEN, LAST.

FOR THE INFORMATION OF RICHMOND, WHITE HOUSE HAS REQUESTED
EXPEDITE INVESTIGATION OF BORK WHO HAS BEEN ANNOUNCED AS BEING
CONSIDERED FOR THE POSITION OF DEPUTY SOLICITOR GENERAL OF THE US.
BORN JAN. NINE, TWENTY SEVEN, PITTSBURG, PA., AND CURRENTLY
PROFESSOR OF LAW AT YALE LAW SCHOOL.

DEPARTMENT OF JUSTICE HAS REQUESTED THAT IT BE FURNISHED
COPIES OF REPORTS OF INVESTIGATION. SUBMIT ALL RESULTS BY
TELETYPE. SUBMIT THREE COPIES OF REPORTS TO BUREAU.

APPOINTEE TELEPHONICALLY CONTACTED NHO THIS DATE AND
ADVISED HE ^{IS} A TRUSTEE FOR THE WOODROW WILSON CENTER FOR INTER-
NATIONAL SCHOLARS LOCATED IN THE SMITHSONIAN INSTITUTE, WASHINGTON,
D.C. APPLICANT IS DIRECTOR OF THE THOMAS JEFFERSON CENTER
FOUNDATION AT THE UNIV. OF VIRGINIA, CHARLOTTESVILLE, VA. APPOINTEE
ADVISED PROFESSOR [] ON THE FACULTY AT UNIV. **NOT RECORDED**
FAMILIAR WITH HIS WORK.

b6
b7C

161-9206-9
JAN 31 1973

APPOINTEE ADVISED WHILE IN CHICAGO, HE APPEARED BEFORE THE

END PAGE ONE

137
58 FEB 5 1973

PAGE TWO NH 161-1518

FOLLOWING FEDERAL DISTRICT COURT JUDGES;

EDWIN ROBSON, JUDGE AUTIN, SAM PERRY, CHIEF JUDGE CAMPBELL.

APPOINTEE FURTHER ADVISED HE HAD NO CONTACTS WITH ANY
MEMBERS OF THE CIVIL RIGHTS ORGANIZATIONS OR RELIGIOUS GROUPS
IN CHICAGO.

CHICAGO, RICHMOND, AND WFO HANDLE PER INSTRUCTIONS.

INVESTIGATION CONTINUING AT NEW HAVEN.

END

HOLD FOR ONE MORE AFTER ACK

F B I

Date: 12/14/72

Transmit the following in _____
(Type in plaintext or code)Via AIRTEL _____
(Priority)

TO: ACTING DIRECTOR, FBI

FROM: SAC, NEW HAVEN (161-1518) (P)

SUBJECT: ROBERT HERON BORK
SPECIAL INQUIRY

ReButel 12/11/72

The following is a list compiled from the bibliography of the appointee as obtained at the Yale University Law School Library:

"Antitrust for Australia? - an evaluation of the American Experience" Australian Law Journal 9/30/65

"Civil Rights - A Challenge" New Republic 8/31/63
9/21/63

"The Civil Rights Bill" Chicago Tribune 3/1/64

"Conflicts Between Patent and Antitrust Laws? - Comments" Patent, Trademark, & Copyright Journal of Research and Education 1966

"Contrasts in Antitrust Theory: I" Columbia Law Review 3/65

"Criminal enforcement of the antitrust laws: a general appraisal" N.Y. Symposium on Antitrust Laws 1963
DEC 16 1972

2 - Bureau (Encs. 3) (RM)
1 - New Haven
RHG/cbs
(3)

ENCLOSURE

Approved: 58 FEB 1973
Special Agent in Charge

Sent _____ M Per _____

NH 161-1518

"The crisis in antitrust"	<u>Fortune</u>	12/63
"Direct controls and the free market"	<u>Yale Political</u>	6/64
"The goals of antitrust..."	<u>Columbia Law Review</u>	3/65
"The goals of antitrust policy"	<u>American Economic Review</u>	5/67
"Legal dimensions of the decision to intercede in Cambodia"	<u>American Journal of International Law</u>	1/71
"Legislative intent and the policy of the Sherman Act"	<u>Journal of Law and Economics</u>	10/66
"The role of reason and the per se concept: price fixing and market division"	<u>Yale Law Journal</u>	4/65
"Antitrust in dubious battle"	<u>Fortune</u>	9/69
"Neutral principles and some first amendment problems"	<u>Indiana Law Journal</u>	Fall, 1971
"Resale price maintenance and consumer welfare"	<u>Yale Law Journal</u>	4/68
"The Supreme Court vs. corporate efficiency"		8/67
"We suddenly feel that law is vulnerable"	<u>Fortune</u>	12/71
"Why I am for Nixon"	<u>New Republic</u>	6/1/68

NH 161-1518

The following articles, reproduced in their entirety,
are submitted as enclosures:

"The goals of antitrust: A dialogue on policy"	<u>Columbia Law Review</u>	3/65
"Resale price maintenance and consumer welfare"	<u>Yale Law Journal</u>	4/68
"Neutral principles and some first amendment pro- blems"	<u>Indiana Law Journal</u>	Fall, 1971

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NEUTRAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS*

ROBERT H. BORK†

A persistently disturbing aspect of constitutional law is its lack of theory, a lack which is manifest not merely in the work of the courts but in the public, professional and even scholarly discussion of the topic. The result, of course, is that courts are without effective criteria and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes. In the present state of affairs that expectation is inevitable, but it is nevertheless deplorable.

The remarks that follow do not, of course, offer a general theory of constitutional law. They are more properly viewed as ranging shots, an attempt to establish the necessity for theory and to take the argument of how constitutional doctrine should be evolved by courts a step or two farther. The first section centers upon the implications of Professor Wechsler's concept of "neutral principles," and the second attempts to apply those implications to some important and much-debated problems in the interpretation of the first amendment. The style is informal since these remarks were originally lectures and I have not thought it worthwhile to convert these speculations and arguments into a heavily researched, balanced and thorough presentation, for that would result in a book.

THE SUPREME COURT AND THE DEMAND FOR PRINCIPLE

The subject of the lengthy and often acrimonious debate about the proper role of the Supreme Court under the Constitution is one that preoccupies many people these days: when is authority legitimate? I find it convenient to discuss that question in the context of the Warren Court and its works simply because the Warren Court posed the issue in acute form. The issue did not disappear along with the era of the Warren Court

* The text of this article was delivered in the Spring of 1971 by Professor Bork at the Indiana University School of Law as part of the Addison C. Harriss lecture series.
† Professor of Law, Yale Law School.

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ENCLOSURE

majorities, however. It arises when any court either exercises or declines to exercise the power to invalidate any act of another branch of government. The Supreme Court is a major power center, and we must ask when its power should be used and when it should be withheld.

Our starting place, inevitably, is Professor Herbert Wechsler's argument that the Court must not be merely a "naked power organ," which means that its decisions must be controlled by principle.¹ "A principled decision," according to Wechsler, "is one that rests on reasons with respect to all the issues in a case, reasons that in their generality and their neutrality transcend any immediate result that is involved."²

Wechsler chose the term "neutral principles" to capsule his argument, though he recognizes that the legal principle to be applied is itself never neutral because it embodies a choice of one value rather than another. Wechsler asked for the neutral application of principles, which is a requirement, as Professor Louis L. Jaffe puts it, that the judge "sincerely believe in the principle upon which he purports to rest his decision." "The judge," says Jaffe, "must believe in the validity of the reasons given for the decision at least in the sense that he is prepared to apply them to a later case which he cannot honestly distinguish."³ He must not, that is, decide lawlessly. But is the demand for neutrality in judges merely another value choice, one that is no more principled than any other? I think not, but to prove it we must rehearse fundamentals. This is familiar terrain but important and still debated.

The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. The anomaly is dissipated, however, by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests. This model we may for convenience, though perhaps not with total accuracy, call "Madisonian."⁴

A Madisonian system is not completely democratic, if by "democratic" we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no better reason that they are majorities. We need not pause here to examine the philosophical under-

1. H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 3, 27 (1961) [hereinafter cited as WECHSLER].

2. *Id.*

3. L. JAFFE, *ENGLISH AND AMERICAN JUDGES AS LAWMAKERS* 38 (1969).

4. See R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 4-33 (1956).

pinnings of that assumption since it is a "given" in our society; nor need we worry that "majority" is a term of art meaning often no more than the shifting combinations of minorities that add up to temporary majorities in the legislature. That majorities are so constituted is inevitable. In any case, one essential premise of the Madisonian model is majoritarianism. The model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.

Some see the model as containing an inherent, perhaps an insoluble, dilemma.⁵ Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor the minority can be trusted to define the freedom of the other. This dilemma is resolved in constitutional theory, and in popular understanding, by the Supreme Court's power to define both majority and minority freedom through the interpretation of the Constitution. Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.

But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority.

This argument is central to the issue of legitimate authority because the Supreme Court's power to govern rests upon popular acceptance of this model. Evidence that this is, in fact, the basis of the Court's power is to be gleaned everywhere in our culture. We need not canvass here such things as high school civics texts and newspaper commentary, for the most telling evidence may be found in the U.S. Reports. The Supreme Court regularly insists that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority

5. *Id.* at 23-24.

but are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.

This is, I think, the ultimate reason the Court must be principled. If it does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based upon the Constitution, judicial supremacy, given the axioms of our system, is, precisely to that extent, illegitimate. The root of its illegitimacy is that it opens a chasm between the reality of the Court's performance and the constitutional and popular assumptions that give it power.

I do not mean to rest the argument entirely upon the popular understanding of the Court's function. Even if society generally should ultimately perceive what the Court is in fact doing and, having seen, prove content to have major policies determined by the unguided discretion of judges rather than by elected representatives, a principled judge would, I believe, continue to consider himself bound by an obligation to the document and to the structure of government that it prescribes. At least he would be bound so long as any litigant existed who demanded such adherence of him. I do not understand how, on any other theory of judicial obligation, the Court could, as it does now, protect voting rights if a large majority of the relevant constituency were willing to see some groups or individuals deprived of such rights. But even if I am wrong in that, at the very least an honest judge would owe it to the body politic to cease invoking the authority of the Constitution and to make explicit the imposition of his own will, for only then would we know whether the society understood enough of what is taking place to be said to have consented.

Judge J. Skelly Wright, in an argument resting on different premises, has severely criticized the advocates of principle. He defends the value-choosing role of the Warren Court, setting that Court in opposition to something he refers to as the "scholarly tradition," which criticizes that Court for its lack of principle.⁶ A perceptive reader, sensitive to nuance, may suspect that the Judge is rather out of sympathy with that tradition from such hints as his reference to "self-appointed scholastic mandarins."⁷

The "mandarins" of the academy anger the Judge because they engage in "haughty derision of the Court's powers of analysis and reason-

⁶ Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971) [hereinafter cited as Wright].

⁷ *Id.* at 777.

ing."⁸ Yet, curiously enough, Judge Wright makes no attempt to refute the charge but rather seems to adopt the technique of confession and avoidance. He seems to be arguing that a Court engaged in choosing fundamental values for society cannot be expected to produce principled decisions at the same time. Decisions first, principles later. One wonders, however, how the Court or the rest of us are to know that the decisions are correct or what they portend for the future if they are not accompanied by the principles that explain and justify them. And it would not be amiss to point out that quite often the principles required of the Warren Court's decisions never did put in an appearance. But Judge Wright's main point appears to be that value choice is the most important function of the Supreme Court, so that if we must take one or the other, and apparently we must, we should prefer a process of selecting values to one of constructing and articulating principles. His argument, I believe, boils down to a syllogism. I. The Supreme Court should "protect our constitutional rights and liberties." II. The Supreme Court must "make fundamental value choices" in order to "protect our constitutional rights and liberties." III. Therefore, the Supreme Court should "make fundamental value choices."⁹

The argument displays an all too common confusion. If we have constitutional rights and liberties already, rights and liberties specified by the Constitution,¹⁰ the Court need make no fundamental value choices in order to protect them, and it certainly need not have difficulty enunciating

8. *Id.* at 777-78.

9. This syllogism is implicit in much of Judge Wright's argument. *E.g.*, "If it is proper for the Court to make fundamental value choices to protect our constitutional rights and liberties, then it is self-defeating to say that if the Justices cannot come up with a perfectly reasoned and perfectly general opinion *now*, then they should abstain from decision altogether." *Id.* at 779. The first clause is the important one for present purposes; the others merely caricature the position of commentators who ask for principle.

10. A position Judge Wright also seems to take at times. "Constitutional choices are in fact different from ordinary decisions. The reason is simple: the most important value choices have already been made by the framers of the Constitution." *Id.* at 784. One wonders how the Judge squares this with his insistence upon the propriety of the judiciary making "fundamental value choices." One also wonders what degree of specificity is required before the framers may realistically be said to have made the "most important value choices." The Warren Court has chosen to expand the fourteenth amendment's theme of equality in ways certainly not foreseen by the framers of that provision. A prior Court expanded the amendment's theme of liberty. Are both Courts to be judged innocent of having made the most important value choices on the ground that the framers mentioned both liberty and equality? If so, the framers must be held to have delegated an almost complete power to govern to the Supreme Court, and it is untrue to say that a constitutional decision is any different from an ordinary governmental decision. Judge Wright simply never faces up to the problem he purports to address: how free is the Court to choose values that will override the values chosen by elected representatives?

principles. If, on the other hand, "constitutional rights and liberties" are not in some real sense specified by the Constitution but are the rights and liberties the Court chooses, on the basis of its own values, to give to us, then the conclusion was contained entirely in the major premise, and the Judge's syllogism is no more than an assertion of what it purported to prove.

If I am correct so far, no argument that is both coherent and respectable can be made supporting a Supreme Court that "chooses fundamental values" because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society. The man who understands the issues and nevertheless insists upon the rightness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views. He claims for the Supreme Court an institutionalized role as perpetrator of limited coups d'etat.

Such a man occupies an impossible philosophic position. What can he say, for instance, of a Court that does not share his politics or his morality? I can think of nothing except the assertion that he will ignore the Court whenever he can get away with it and overthrow it if he can. In his view the Court has no legitimacy, and there is no reason any of us should obey it. And, this being the case, the advocate of a value-choosing Court must answer another difficult question. Why should the Court, a committee of nine lawyers, be the sole agent of change? The man who prefers results to processes has no reason to say that the Court is more legitimate than any other institution. If the Court will not listen, why not argue the case to some other group, say the Joint Chiefs of Staff, a body with rather better means for implementing its decisions?

We are driven to the conclusion that a legitimate Court must be controlled by principles exterior to the will of the Justices. As my colleague, Professor Alexander Bickel, puts it, "The process of the coherent, analytically warranted, principled declaration of general norms alone justifies the Court's function"¹¹ Recognition of the need for principle is only the first step, but once that step is taken much more follows. Logic has a life of its own, and devotion to principle requires that we follow where logic leads.

Professor Bickel identifies Justice Frankfurter as the leading judicial proponent of principle but concedes that even Frankfurter never found a "rigorous general accord between judicial supremacy and democratic

11. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 96 (1970).

theory."¹² Judge Wright responds, "The leading commentators of the scholarly tradition have tried ever since to succeed where the Justice failed."¹³ As Judge Wright quite accurately suggests, the commentators have so far had no better luck than the Justice.

On reason, I think, is clear. We have not carried the idea of neutrality far enough. We have been talking about neutrality in the *application* of principles. If judges are to avoid imposing their own values upon the rest of us, however, they must be neutral as well in the *definition* and the *derivation* of principles.

It is easy enough to meet the requirement of neutral application by stating a principle so narrowly that no embarrassment need arise in applying it to all cases it subsumes, a tactic often urged by proponents of "judicial restraint." But that solves very little. It certainly does not protect the judge from the intrusion of his own values. The problem may be illustrated by *Griswold v. Connecticut*,¹⁴ in many ways a typical decision of the Warren Court. *Griswold* struck down Connecticut's statute making it a crime, even for married couples, to use contraceptive devices. If we take the principle of the decision to be a statement that government may not interfere with any acts done in private, we need not even ask about the principle's dubious origin for we know at once that the Court will not apply it neutrally. The Court, we may confidently predict, is not going to throw constitutional protection around heroin use or sexual acts with a consenting minor. We can gain the possibility of neutral application by reframing the principle as a statement that government may not prohibit the use of contraceptives by married couples, but that is not enough. The question of neutral definition arises: Why does the principle extend only to married couples? Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior, only to sex? The question of neutral derivation also arises: What justifies any limitation upon legislatures in this area? What is the origin of any principle one may state?

To put the matter another way, if a neutral judge must demonstrate why principle *X* applies to cases *A* and *B* but not to case *C* (which is, I believe, the requirement laid down by Professors Wechsler and Jaffe), he must, by the same token, also explain why the principle is defined as *X* rather than as *X minus*, which would cover *A* but not cases *B* and *C*, or as *X plus*, which would cover all cases, *A*, *B* and *C*. Similarly, he must

12. *Id.* at 34.

13. Wright, *supra* note 6, at 775.

14. 381 U.S. 479 (1965).

explain why *X* is a proper principle of limitation on majority power at all. Why should he not choose *non-X*? If he may not choose lawlessly between cases in applying principle *X*, he may certainly not choose lawlessly in defining *X* or in choosing *X*, for principles are after all only organizations of cases into groups. To choose the principle and define it is to decide the cases.

It follows that the choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. The case just mentioned illustrates the point. The *Griswold* decision has been acclaimed by legal scholars as a major advance in constitutional law, a salutary demonstration of the Court's ability to protect fundamental human values. I regret to have to disagree, and my regret is all the more sincere because I once took the same position and did so in print.¹⁵ In extenuation I can only say that at the time I thought, quite erroneously, that new basic rights could be derived logically by finding and extrapolating a more general principle of individual autonomy underlying the particular guarantees of the Bill of Rights.

The Court's *Griswold* opinion, by Justice Douglas, and the array of concurring opinions, by Justices Goldberg, White and Harlan, all failed to justify the derivation of any principle used to strike down the Connecticut anti-contraceptive statute or to define the scope of the principle. Justice Douglas, to whose opinion I must confine myself, began by pointing out that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."¹⁶ Nothing is exceptional there. In the case Justice Douglas cited, *NAACP v. Alabama*,¹⁷ the State was held unable to force disclosure of membership lists because of the chilling effect upon the rights of assembly and political action of the NAACP's members. The penumbra was created solely to preserve a value central to the first amendment, applied in this case through the fourteenth amendment. It had no life of its own as a right independent of the value specified by the first amendment.

But Justice Douglas then performed a miracle of transubstantiation. He called the first amendment's penumbra a protection of "privacy" and

15. Bork, *The Supreme Court Needs a New Philosophy*, *FORTUNE*, Dec., 1968, at 170.

16. 381 U.S. at 484.

17. 357 U.S. 449 (1958).

then asserted that other amendments create "zones of privacy."¹⁸ He had no better reason to use the word "privacy" than that the individual is free within these zones, free to act in public as well as in private. None of these penumbral zones—from the first, third, fourth or fifth amendments, all of which he cited, along with the ninth—covered the case before him. One more leap was required. Justice Douglas asserted that these various "zones of privacy" created an independent right of privacy,¹⁹ a right not lying within the penumbra of any specific amendment. He did not disclose, however, how a series of specified rights combined to create a new and unspecified right.

The *Griswold* opinion fails every test of neutrality. The derivation of the principle was utterly specious, and so was its definition. In fact, we are left with no idea of what the principle really forbids. Derivation and definition are interrelated here. Justice Douglas called the amendments and their penumbras "zones of privacy," though of course they are not that at all. They protect both private and public behavior and so would more properly be labelled "zones of freedom." If we follow Justice Douglas in his next step, these zones would then add up to an independent right of freedom, which is to say, a general constitutional right to be free of legal coercion, a manifest impossibility in any imaginable society.

Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it. We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in *Griswold* through principle. The reason is obvious. Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure. Compare the facts in *Griswold* with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical.

In *Griswold* a husband and wife assert that they wish to have sexual relations without fear of unwanted children. The law impairs their sexual gratifications. The State can assert, and at one stage in that litigation did assert, that the majority finds the use of contraceptives immoral. Knowl-

18. 381 U.S. at 484.

19. *Id.* at 485, 486.

edge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratifications.

The electrical company asserts that it wishes to produce electricity at low cost in order to reach a wide market and make profits. Its customer asserts that he wants a lower cost so that prices can be held low. The smoke pollution regulation impairs his and the company's stockholders' economic gratifications. The State can assert not only that the majority prefer clean air to lower prices, but also that the absence of the regulation impairs the majority's physical and aesthetic gratifications.

Neither case is covered specifically or by obvious implication in the Constitution. Unless we can distinguish forms of gratification, the only course for a principled Court is to let the majority have its way in both cases. It is clear that the Court cannot make the necessary distinction. There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another.²⁰ Why is sexual gratification more worthy than moral gratification? Why is sexual gratification nobler than economic gratification? There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy. The issue of the community's moral and ethical values, the issue of the degree of pain an activity causes, are matters concluded by the passage and enforcement of the laws in question. The judiciary has no role to play other than that of applying the statutes in a fair and impartial manner.

One of my colleagues refers to this conclusion, not without sarcasm, as the "Equal Gratification Clause." The phrase is apt, and I accept it, though not the sarcasm. Equality of human gratifications, where the document does not impose a hierarchy, is an essential part of constitutional doctrine because of the necessity that judges be principled. To be perfectly clear on the subject, I repeat that the principle is not applicable to legislatures. Legislation requires value choice and cannot be principled in the sense under discussion. Courts must accept any value choice the legislature

20. The impossibility is related to that of making interpersonal comparisons of utilities. See L. ROBBINS, *THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE*, ch. 4 (2d ed. 1969); P. SAMUELSON, *FOUNDATIONS OF ECONOMIC ANALYSIS* 243-52 (1965).

makes unless it clearly runs contrary to a choice made in the framing of the Constitution.

It follows, of course, that broad areas of constitutional law ought to be reformulated. Most obviously, it follows that substantive due process, revived by the *Griswold* case, is and always has been an improper doctrine. Substantive due process requires the Court to say, without guidance from the Constitution, which liberties or gratifications may be infringed by majorities and which may not. This means that *Griswold's* antecedents were also wrongly decided, e.g., *Meyer v. Nebraska*,²¹ which struck down a statute forbidding the teaching of subjects in any language other than English; *Pierce v. Society of Sisters*,²² which set aside a statute compelling all Oregon school children to attend public schools; *Adkins v. Children's Hospital*,²³ which invalidated a statute of Congress authorizing a board to fix minimum wages for women and children in the District of Columbia; and *Lochner v. New York*,²⁴ which voided a statute fixing maximum hours of work for bakers. With some of these cases I am in political agreement, and perhaps *Pierce's* result could be reached on acceptable grounds, but there is no justification for the Court's methods. In *Lochner*, Justice Peckham, defending liberty from what he conceived as a mere meddlesome interference, asked, "[A]re we all . . . at the mercy of legislative majorities?"²⁵ The correct answer, where the Constitution does not speak, must be "yes."

The argument so far also indicates that most of substantive equal protection is also improper. The modern Court, we need hardly be reminded, used the equal protection clause the way the old Court used the due process clause. The only change was in the values chosen for protection and the frequency with which the Court struck down laws.

The equal protection clause has two legitimate meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause. The bare concept of equality provides no guide for courts. All law discriminates and thereby creates inequality. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of "fairness" or to what it regards as "fundamental" interests in order to demand equality in some

21. 262 U.S. 390 (1922).

22. 268 U.S. 510 (1925).

23. 261 U.S. 525 (1923).

24. 198 U.S. 45 (1905).

25. *Id.* at 59.

cases but not in others, thus choosing values and producing a line of cases as improper and as intellectually empty as *Griswold v. Connecticut*. Any casebook lists them, and the differing results cannot be explained on any ground other than the Court's preferences for particular values: *Skinner v. Oklahoma*²⁶ (a forbidden inequality exists when a state undertakes to sterilize robbers but not embezzlers); *Kotch v. Board of River Port Pilot Commissioners*²⁷ (no right to equality is infringed when a state grants pilots' licenses only to persons related by blood to existing pilots and denies licenses to persons otherwise as well qualified); *Goesaert v. Cleary*²⁸ (a state does not deny equality when it refuses to license women as bartenders unless they are the wives or daughters of male owners of licensed liquor establishments); *Railway Express Agency v. New York*²⁹ (a city may forbid truck owners to sell advertising space on their trucks as a distracting hazard to traffic safety though it permits owners to advertise their own business in that way); *Shapiro v. Thompson*³⁰ (a state denies equality if it pays welfare only to persons who have resided in the state for one year); *Levy v. Louisiana*³¹ (a state may not limit actions for a parent's wrongful death to legitimate children and deny it to illegitimate children). The list could be extended, but the point is that the cases cannot be reconciled on any basis other than the Justices' personal beliefs about what interests or gratifications ought to be protected.

Professor Wechsler notes that Justice Frankfurter expressed "disquietude that the line is often very thin between the cases in which the Court felt compelled to abstain from adjudication because of their 'political' nature, and the cases that so frequently arise in applying the concepts of 'liberty' and 'equality'."³² The line is not very thin; it is non-existent. There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required. These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions.

We may now be in a position to discuss certain of the problems of legitimacy raised by Professor Wechsler. Central to his worries was the

26. 316 U.S. 535 (1942).

27. 330 U.S. 552 (1947).

28. 335 U.S. 464 (1948).

29. 336 U.S. 106 (1949).

30. 394 U.S. 618 (1969).

31. 391 U.S. 68 (1968).

32. WECHSLER, *supra* note 1, at 11, citing Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 227-28 (1955).

Supreme Court's decision in *Brown v. Board of Education*.³³ Wechsler said he had great difficulty framing a neutral principle to support the *Brown* decision, though he thoroughly approved of its result on moral and political grounds. It has long been obvious that the case does not rest upon the grounds advanced in Chief Justice Warren's opinion, the specially harmful effects of enforced school segregation upon black children. That much, as Wechsler and others point out, is made plain by the per curiam decisions that followed outlawing segregated public beaches, public golf courses and the like. The principle in operation may be that government may not employ race as a classification. But the genesis of the principle is unclear.

Wechsler states that his problem with the segregation cases is not that:

History does not confirm that an agreed purpose of the fourteenth amendment was to forbid separate schools or that there is important evidence that many thought the contrary; the words are general and leave room for expanding content as time passes and conditions change.³⁴

The words are general but surely that would not permit us to escape the framers' intent if it were clear. If the legislative history revealed a consensus about segregation in schooling and all the other relations in life, I do not see how the Court could escape the choices revealed and substitute its own, even though the words are general and conditions have changed. It is the fact that history does not reveal detailed choices concerning such matters that permits, indeed requires, resort to other modes of interpretation.

Wechsler notes that *Brown* has to do with freedom to associate and freedom not to associate, and he thinks that a principle must be found that solves the following dilemma:

[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension. . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in

33. 347 U.S. 483 (1954).

34. WECHSLER, *supra* note 1, at 43.

neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.³⁵

It is extremely unlikely that Professor Wechsler ever will be able to write that opinion to his own satisfaction. He has framed the issue in insoluble terms by calling it a "conflict between human claims of high dimension," which is to say that it requires a judicial choice between rival gratifications in order to find a fundamental human right. So viewed it is the same case as *Griswold v. Connecticut* and not susceptible of principled resolution.

A resolution that seems to me more plausible is supported rather than troubled by the need for neutrality. A court required to decide *Brown* would perceive two crucial facts about the history of the fourteenth amendment. First, the men who put the amendment in the Constitution intended that the Supreme Court should secure against government action some large measure of racial equality. That is certainly the core meaning of the amendment. Second, those same men were not agreed about what the concept of racial equality requires. Many or most of them had not even thought the matter through. Almost certainly, even individuals among them held such views as that blacks were entitled to purchase property from any willing seller but not to attend integrated schools, or that they were entitled to serve on juries but not to intermarry with whites, or that they were entitled to equal physical facilities but that the facilities should be separate, and so on through the endless anomalies and inconsistencies with which moral positions so frequently abound. The Court cannot conceivably know how these long-dead men would have resolved these issues had they considered, debated and voted on each of them. Perhaps it was precisely because they could not resolve them that they took refuge in the majestic and ambiguous formula: the equal protection of the laws.

But one thing the Court does know: it was intended to enforce a core idea of black equality against governmental discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that

35. *Id.* at 47.

applies to all cases. For the same reason, the Court cannot decide that physical equality is important but psychological equality is not. Thus, the no-state-enforced-discrimination rule of *Brown* must overturn and replace the separate-but-equal doctrine of *Plessy v. Ferguson*. The same result might be reached on an alternative ground. If the Court found that it was incapable as an institution of policing the issue of the physical equality of separate facilities, the variables being insufficiently comparable and the cases too many, it might fashion a no-segregation rule as the only feasible means of assuring even physical equality.

In either case, the value choice (or, perhaps more accurately, the value impulse) of the fourteenth amendment is fleshed out and made into a legal rule—not by moral precept, not by a determination that claims for association prevail over claims for separation as a general matter, still less by consideration of psychological test results, but on purely juridical grounds.

I doubt, however, that it is possible to find neutral principles capable of supporting some of the other decisions that trouble Professor Wechsler. An example is *Shelley v. Kraemer*,³⁶ which held that the fourteenth amendment forbids state court enforcement of a private, racially restrictive covenant. Although the amendment speaks only of denials of equal protection of the laws by the state, Chief Justice Vinson's opinion said that judicial enforcement of a private person's discriminatory choice constituted the requisite state action. The decision was, of course, not neutral in that the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish. Any dispute between private persons about absolutely any aspect of life can be brought to a court by one of the parties; and, if race is involved, the rule of *Shelley* would require the court to deny the freedom of any individual to discriminate in the conduct of any part of his affairs simply because the contrary result would be state enforcement of discrimination. The principle would apply not merely to the cases hypothesized by Professor Wechsler—the inability of the state to effectuate a will that draws a racial line or to vindicate the privacy of property against a trespasser excluded because of the homeowner's racial preferences—but to any situation in which the person claiming freedom in any relationship had a racial motivation.

That much is the common objection to *Shelley v. Kraemer*, but the trouble with the decision goes deeper. Professor Louis Henkin has suggested that we view the case as correctly decided, accept the principle

36. 334 U.S. 1 (1948).

that must necessarily underline it if it is respectable law and proceed to apply that principle:

Generally, the equal protection clause precludes state enforcement of private discrimination. There is, however, a small area of liberty favored by the Constitution even over claims to equality. Rights of liberty and property, of privacy and voluntary association, must be balanced in close cases, against the right not to have the state enforce discrimination against the victim. In the few instances in which the right to discriminate is protected or perferred by the Constitution, the state may enforce it.³⁷

This attempt to rehabilitate *Shelley* by applying its principle honestly demonstrates rather clearly why neutrality in the application of principle is not enough. Professor Henkin's proposal fails the test of the neutral derivation of principle. It converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion. The judge's power to govern does not become more legitimate if he is constrained to apply his principle to all cases but is free to make up his own principles. Matters are only made worse by Professor Henkin's suggestion that the judge introduce a small number of exceptions for cases where liberty is more important than equality, for now even the possibility of neutrality in the application of principle is lost. The judge cannot find in the fourteenth amendment or its history any choices between equality and freedom in private affairs. The judge, if he were to undertake this task, would be choosing, as in *Griswold v. Connecticut*, between competing gratifications without constitutional guidance. Indeed, Professor Henkin's description of the process shows that the task he would assign is legislative:

The balance may be struck differently at different times, reflecting differences in prevailing philosophy and the continuing movement from *laissez-faire* government toward welfare and meliorism. The changes in prevailing philosophy themselves may sum up the judgment of judges as to how the conscience of our society weighs the competing needs and claims of liberty and equality in time and context—the adequacy of progress toward

37. Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 496 (1962).

equality as a result of social and economic forces, the effect of lack of progress on the life of the Negro and, perhaps, on the image of the United States, and the role of official state forces in advancing or retarding this progress.³⁸

In short, after considering everything a legislator might consider, the judge is to write a detailed code of private race relations. Starting with an attempt to justify *Shelley* on grounds of neutral principle, the argument rather curiously arrives at a position in which neutrality in the derivation, definition and application of principle is impossible and the wrong institution is governing society.

The argument thus far claims that, cases of race discrimination aside, it is always a mistake for the Court to try to construct substantive individual rights under the due process or the equal protection clause. Such rights cannot be constructed without comparing the worth of individual gratifications, and that comparison cannot be principled. Unfortunately, the rhetoric of constitutional adjudication is increasingly a rhetoric about "fundamental" rights that inhere in humans. That focus does more than lead the Court to construct new rights without adequate guidance from constitutional materials. It also distorts the scope and definition of rights that have claim to protection.

There appear to be two proper methods of deriving rights from the Constitution. The first is to take from the document rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules. We may call these specified rights. The second method derives rights from governmental processes established by the Constitution. These are secondary or derived individual rights. This latter category is extraordinarily important. This method of derivation is essential to the interpretation of the first amendment, to voting rights, to criminal procedure and to much else.

Secondary or derivative rights are not possessed by the individual because the Constitution has made a value choice about individuals. Neither are they possessed because the Supreme Court thinks them fundamental to all humans. Rather, these rights are located in the individual for the sake of a governmental process that the Constitution outlines and that the Court should preserve. They are given to the individual because his enjoyment of them will lead him to defend them in court and thereby preserve the governmental process from legislative or executive deformation.

38. *Id.* at 494.

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The distinction between rights that are inherent and rights that are derived from some other value is one that our society worked out long ago with respect to the economic market place, and precisely the same distinction holds and will prove an aid to clear thought with respect to the political market place. A right is a form of property, and our thinking about the category of constitutional property might usefully follow the progress of thought about economic property. We now regard it as thoroughly old hat, *passee* and in fact downright tiresome to hear rhetoric about an inherent right to economic freedom or to economic property. We no longer believe that economic rights inhere in the individual because he is an individual. The modern intellectual argues the proper location and definition of property rights according to judgments of utility—the capacity of such rights to forward some other value. We may, for example, wish to maximize the total wealth of society and define property rights in a way we think will advance that goal by making the economic process run more efficiently. As it is with economic property rights, so it should be with constitutional rights relating to governmental processes.

The derivation of rights from governmental processes is not an easy task, and I do not suggest that a shift in focus will make anything approaching a mechanical jurisprudence possible. I do suggest that, for the reasons already argued, no guidance whatever is available to a court that approaches, say, voting rights or criminal procedures through the concept of substantive equality.

The state legislative reapportionment cases were unsatisfactory precisely because the Court attempted to apply a substantive equal protection approach. Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument. The principle of one man, one vote was not neutrally derived: it runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula.³⁹ The principle was not neutrally defined: it presumably rests upon some theory of equal weight for all votes, and yet we have no explanation of why it does not call into question other devices that defeat the principle, such as the executive veto, the committee system, the filibuster, the requirement on some issues of two-thirds majorities and the practice

39. See the dissents of Justice Frankfurter in *Baker v. Carr*, 369 U.S. 186, 266 (1962); Justice Harlan in *Reynolds v. Sims*, 377 U.S. 533, 589 (1964); and Justice Stewart in *Lucas v. Forty-Fourth Gen. Ass'y*, 377 U.S. 713, 744 (1964).

of districting. And, as we all know now, the principle, even as stated, was not neutrally applied.⁴⁰

To approach these cases as involving rights derived from the requirements of our form of government is, of course, to say that they involve guarantee clause claims. Justice Frankfurter opposed the Court's consideration of reapportionment precisely on the ground that the "case involves all the elements that have made the Guarantee Clause cases non-justiciable," and was a "Guarantee Clause claim masquerading under a different label."⁴¹ Of course, his characterization was accurate, but the same could be said of many voting rights cases he was willing to decide. The guarantee clause, along with the provisions and structure of the Constitution and our political history, at least provides some guidance for a Court. The concept of the primary right of the individual in this area provides none. Whether one chooses to use the guarantee of a republican form of government of article IV, § 4 as a peg or to proceed directly to considerations of constitutional structure and political practice probably makes little difference. Madison's writing on the republican form of government specified by the guarantee clause suggests that representative democracy may properly take many forms, so long as the forms do not become "aristocratic or monarchical."⁴² That is certainly less easily translated into the rigid one person, one vote requirement, which rests on a concept of the right of the individual to equality, than into the requirement expressed by Justice Stewart in *Lucas v. Forty-Fourth General Assembly*⁴³ that a legislative apportionment need only be rational and "must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State."⁴⁴ The latter is a standard derived from the requirements of a democratic process rather than from the rights of individuals. The topic of governmental processes and the rights that may be derived from them is so large that it is best left at this point. It has been raised only as a reminder that there is a legitimate mode of deriving and defining constitutional rights, however difficult intellectually, that is available to replace the present unsatisfactory focus.

At the outset I warned that I did not offer a complete theory of constitutional interpretation. My concern has been to attack a few points that may be regarded as salient in order to clear the way for such a theory. I

40. See *Fortson v. Morris*, 385 U.S. 231 (1966).

41. *Baker v. Carr*, 369 U.S. 186, 297 (1962).

42. *THE FEDERALIST* No. 43 (J. Madison).

43. 377 U.S. 713 (1964).

44. *Id.* at 753-54.

turn next to a suggestion of what neutrality, the decision of cases according to principle, may mean for certain first amendment problems.

SOME FIRST AMENDMENT PROBLEMS: THE SEARCH FOR THEORY

The law has settled upon no tenable, internally consistent theory of the scope of the constitutional guarantee of free speech. Nor have many such theories been urged upon the courts by lawyers or academicians. Professor Harry Kalven, Jr., one whose work is informed by a search for theory, has expressed wonder that we should feel the need for theory in the area of free speech when we tolerate inconsistencies in other areas of the law so calmly.⁴⁵ He answers himself:

If my puzzle as to the First Amendment is not a true puzzle, it can only be for the congenial reason that free speech is so close to the heart of democratic organization that if we do not have an appropriate theory for our law here, we feel we really do not understand the society in which we live.⁴⁶

Kalven is certainly correct in assigning the first amendment a central place in our society, and he is also right in attributing that centrality to the importance of speech to democratic organization. Since I share this common ground with Professor Kalven, I find it interesting that my conclusions differ so widely from his.

I am led by the logic of the requirement that judges be principled to the following suggestions. Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.

I am, of course, aware that this theory departs drastically from existing Court-made law, from the views of most academic specialists in the field and that it may strike a chill into the hearts of some civil libertarians. But I would insist at the outset that constitutional law, viewed as the set of rules a judge may properly derive from the document and its history, is not an expression of our political sympathies or of our judg-

45. H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 4-5 (1966) [hereinafter cited as KALVEN].

46. *Id.* at 6.

ments about what expediency and prudence require. When decision making its principled it has nothing to say about the speech we like or the speech we hate; it has a great deal to say about how far democratic discretion can govern without endangering the basis of democratic government. Nothing in my argument goes to the question of what laws should be enacted. I like the freedoms of the individual as well as most, and I would be appalled by many statutes that I am compelled to think would be constitutional if enacted. But I am also persuaded that my generally libertarian commitments have nothing to do with the behavior proper to the Supreme Court.

In framing a theory of free speech the first obstacle is the insistence of many very intelligent people that the "first amendment is an absolute." Devotees of this position insist, with a literal respect they do not accord other parts of the Constitution, that the Framers commanded complete freedom of expression without governmental regulation of any kind. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech. . . ." Those who take that as an absolute must be reading "speech" to mean any form of verbal communication and "freedom" to mean total absence of governmental restraint.

Any such reading is, of course, impossible. Since it purports to be an absolute position we are entitled to test it with extreme hypotheticals. Is Congress forbidden to prohibit incitement to mutiny aboard a naval vessel engaged in action against an enemy, to prohibit shouted harangues from the visitors' gallery during its own deliberations or to provide any rules for decorum in federal courtrooms? Are the states forbidden, by the incorporation of the first amendment in the fourteenth, to punish the shouting of obscenities in the streets?

No one, not the most obsessed absolutist, takes any such position, but if one does not, the absolute position is abandoned, revealed as a play on words. Government cannot function if anyone can say anything anywhere at any time. And so we quickly come to the conclusion that lines must be drawn, differentiations made. Nor does that in any way involve us in a conflict with the wording of the first amendment. Laymen may perhaps be forgiven for thinking that the literal words of the amendment command complete absence of governmental inhibition upon verbal activity, but what can one say of lawyers who believe any such thing? Anyone skilled in reading language should know that the words are not necessarily absolute. "Freedom of speech" may very well be a term referring to a defined or assumed scope of liberty, and it may be this area of liberty that is not to be "abridged."

If we turn to history, we discover that our suspicions about the wording are correct, except that matters are even worse. The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject. Professor Leonard Levy's work, *Legacy of Suppression*,⁴⁷ demonstrates that the men who adopted the first amendment did not display a strong libertarian stance with respect to speech. Any such position would have been strikingly at odds with the American political tradition. Our forefathers were men accustomed to drawing a line, to us often invisible, between freedom and licentiousness. In colonial times and during and after the Revolution they displayed a determination to punish speech thought dangerous to government, much of it expression that we would think harmless and well within the bounds of legitimate discourse. Jeffersonians, threatened by the Federalist Sedition Act of 1798, undertook the first American elaboration of a libertarian position in an effort to stay out of jail. Professor Walter Berns offers evidence that even then the position was not widely held.⁴⁸ When Jefferson came to power it developed that he read the first amendment only to limit Congress and he believed suppression to be a proper function of the state governments. He appears to have instigated state prosecutions against Federalists for seditious libel. But these later developments do not tell us what the men who adopted the first amendment intended, and their discussions tell us very little either. The disagreements that certainly existed were not debated and resolved. The first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended. One reason, as Levy shows, is that the Anti-Federalists complained of the absence of a Bill of Rights less because they cared for individual freedoms than as a tactic to defeat the Constitution. The Federalists promised to submit one in order to get the Constitution ratified. The Bill of Rights was then drafted by Federalists, who had opposed it from the beginning; the Anti-Federalists, who were really more interested in preserving the rights of state governments against federal power, had by that time lost interest in the subject.⁴⁹

We are, then, forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or to its history. But we are not without materials

47. L. LEVY, *LEGACY OF SUPPRESSION* (1960) [hereinafter cited as *Levy*].

48. Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109.

49. LEVY, *supra* note 47, at 224-33.

for building. The first amendment indicates that there is something special about speech. We would know that much even without a first amendment, for the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment. Further guidance can be gained from the fact that we are looking for a theory fit for enforcement by judges. The principles we seek must, therefore, be neutral in all three meanings of the word: they must be neutrally derived, defined and applied.

The law of free speech we know today grows out of the Supreme Court decisions following World War I—*Schenck v. United States*,⁵⁰ *Abrams v. United States*,⁵¹ *Gitlow v. New York*,⁵² *Whitney v. California*⁵³—not out of the majority positions but rather from the opinions, mostly dissents or concurrences that were really dissents, of Justices Holmes and Brandeis. Professor Kalven remarks upon “the almost uncanny power” of these dissents. And it is uncanny, for they have prevailed despite the considerable handicap of being deficient in logic and analysis as well as in history. The great Smith Act cases of the 1950’s, *Dennis v. United States*,⁵⁴ as modified by *Yates v. United States*,⁵⁵ and, more recently, in 1969, *Brandenburg v. Ohio*⁵⁶ (voiding the Ohio criminal syndicalism statute), mark the triumph of Holmes and Brandeis. And other cases, culminating perhaps in a modified version of *Roth v. United States*,⁵⁷ have pushed the protections of the first amendment outward from political speech all the way to the fields of literature, entertainment and what can only be called pornography. Because my concern is general theory I shall not attempt a comprehensive survey of the cases nor engage in theological disputation over current doctrinal niceties. I intend to take the position that the law should have been built on Justice Sanford’s majority opinions in *Gitlow* and *Whitney*. These days such an argument has at least the charm of complete novelty, but I think it has other merits as well.

Before coming to the specific issues in *Gitlow* and *Whitney*, I wish

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- 50. 249 U.S. 47 (1919).
 - 51. 250 U.S. 616 (1919).
 - 52. 268 U.S. 652 (1925).
 - 53. 274 U.S. 357 (1927).
 - 54. 341 U.S. 494 (1951).
 - 55. 354 U.S. 298 (1957).
 - 56. 395 U.S. 444 (1969).
 - 57. 354 U.S. 476 (1957).

to begin the general discussion of first amendment theory with consideration of a passage from Justice Brandeis' concurring opinion in the latter case. His *Whitney* concurrence was Brandeis' first attempt to articulate a comprehensive theory of the constitutional protection of speech, and in that attempt he laid down premises which seem to me correct. But those premises seem also to lead to conclusions which Justice Brandeis would have disowned.

As a starting point Brandeis went to fundamentals and attempted to answer the question why speech is protected at all from governmental regulation. If we overlook his highly romanticized version of history and ignore merely rhetorical flourishes, we shall find Brandeis quite provocative.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. The belief that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine. . . . They recognized the risks to which all human institutions are subject. But they knew . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.⁵⁸

We begin to see why the dissents of Brandeis and Holmes possessed the power to which Professor Kalven referred. They were rhetoricians of extraordinary potency, and their rhetoric retains the power, almost half a century latter, to swamp analysis, to persuade, almost to command assent.

But there is structure beneath the rhetoric, and Brandeis is asserting, though he attributes it all to the Founding Fathers, that there are four benefits to be derived from speech. These are:

58. 274 U.S. at 375.

1. The development of the faculties of the individual;
2. The happiness to be derived from engaging in the activity;
3. The provision of a safety valve for society; and,
4. The discovery and spread of political truth.

We may accept these claims as true and as satisfactorily inclusive. When we come to analyze these benefits, however, we discover that in terms of constitutional law they are very different things.

The first two benefits—development of individual faculties and the achievement of pleasure—are or may be found, for both speaker and hearer, in all varieties of speech, from political discourse to shop talk to salacious literature. But the important point is that these benefits do not distinguish speech from any other human activity. An individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors. Speech with only the first two benefits can be preferred to other activities only by ranking forms of personal gratification. These functions or benefits of speech are, therefore, to the principled judge, indistinguishable from the functions or benefits of all other human activity. He cannot, on neutral grounds, choose to protect speech that has only these functions more than he protects any other claimed freedom.

The third benefit of speech mentioned by Brandeis—its safety valve function—is different from the first two. It relates not to the gratification of the individual, at least not directly, but to the welfare of society. The safety valve function raises only issues of expediency or prudence, and, therefore, raises issues to be determined solely by the legislature or, in some cases, by the executive. The legislature may decide not to repress speech advocating the forcible overthrow of the government in some classes of cases because it thinks repression would cause more trouble than it would prevent. Prosecuting attorneys, who must in any event pick and choose among cases, given their limited resources, may similarly decide that some such speech is trivial or that ignoring it would be wisest. But these decisions, involving only the issue of the expedient course, are indistinguishable from thousands of other managerial judgments governments must make daily, though in the extreme case the decision may involve the safety of the society just as surely as a decision whether or not to take a foreign policy stand that risks war. It seems

plain that decisions involving only judgments of expediency are for the political branches and not for the judiciary.

This leaves the fourth function of speech—the “discovery and spread of political truth.” This function of speech, its ability to deal explicitly, specifically and directly with politics and government, is different from any other form of human activity. But the difference exists only with respect to one kind of speech: explicitly and predominantly political speech. This seems to me the only form of speech that a principled judge can prefer to other claimed freedoms. All other forms of speech raise only issues of human gratification and their protection against legislative regulation involves the judge in making decisions of the sort made in *Griswold v. Connecticut*.

It is here that I begin to part company with Professor Kalven. Kalven argues that no society in which seditious libel, the criticism of public officials, is a crime can call itself free and democratic.⁵⁹ I agree, even though the framers of the first amendment probably had no clear view of that proposition. Yet they indicated a value when they said that speech in some sense was special and when they wrote a Constitution providing for representative democracy, a form of government that is meaningless without open and vigorous debate about officials and their policies. It is for this reason, the relation of speech to democratic organization, that Professor Alexander Meiklejohn seems correct when he says:

The First Amendment does not protect a “freedom to speak.” It protects the freedom of those activities of thought and communication by which we “govern.” It is concerned, not with a private right, but with a public power, a governmental responsibility.⁶⁰

But both Kalven and Meiklejohn go further and would extend the protection of the first amendment beyond speech that is explicitly political. Meiklejohn argues that the amendment protects:

Forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express.

59. KALVEN, *supra* note 45, at 16.

60. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

He lists four such thoughts and expressions:

1. Education, in all its phases. . . . 2. The achievements of philosophy and the sciences. . . . 3. Literature and the arts. . . . 4. Public discussions of public issues. . . .⁶¹

Kalven, following a similar line, states: "[T]he invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming."⁶² It is an invitation, I wish to suggest, the principled judge must decline. A dialectic progression I take to be a progression by analogy from one case to the next, an indispensable but perilous method of legal reasoning. The length to which analogy is carried defines the principle, but neutral definition requires that, in terms of the rationale in play, those cases within the principle be more like each other than they are like cases left outside. The dialectical progression must have a principled stopping point. I agree that there is an analogy between criticism of official behavior and the publication of a novel like *Ulysses*, for the latter may form attitudes that ultimately affect politics. But it is an analogy, not an identity. Other human activities and experiences also form personality, teach and create attitudes just as much as does the novel, but no one would on that account, I take it, suggest that the first amendment strikes down regulations of economic activity, control of entry into a trade, laws about sexual behavior, marriage and the like. Yet these activities, in their capacity to create attitudes that ultimately impinge upon the political process, are more like literature and science than literature and science are like political speech. If the dialectical progression is not to become an analogical stampede, the protection of the first amendment must be cut off when it reaches the outer limits of political speech.

Two types of problems may be supposed to arise with respect to this solution. The first is the difficulty of drawing a line between political and non-political speech. The second is that such a line will leave unprotected much speech that is essential to the life of a civilized community. Neither of these problems seems to me to raise crippling difficulties.

The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel, whether the govern-

61. *Id.* at 256-57.

62. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 *Sup. Ct. Rev.* 191, 221.

mental unit involved is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, educational, commercial or literary expressions as such. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial protection. This is not anomalous, I have tried to suggest, since the rationale of the first amendment cannot be the protection of all things or activities that influence political attitudes. Any speech may do that, and we have seen that it is impossible to leave all speech unregulated. Moreover, any conduct may affect political attitudes as much as a novel, and we cannot view the first amendment as a broad denial of the power of government to regulate conduct. The line drawn must, therefore, lie between the explicitly political and all else. Not too much should be made of the undeniable fact that there will be hard cases. Any theory of the first amendment that does not accord absolute protection for all verbal expression, which is to say any theory worth discussing, will require that a spectrum be cut and the location of the cut will always be, arguably, arbitrary. The question is whether the general location of the cut is justified. The existence of close cases is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate.

The other objection—that the political-nonpolitical distinction will leave much valuable speech without constitutional protection—is no more troublesome. The notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom. Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives. That is hardly a terrible fate. At least a society like ours ought not to think it so.

The practical effect of confining constitutional protection to political speech would probably go no further than to introduce regulation or prohibition of pornography. The Court would be freed of the stultifying obligation to apply its self-inflicted criteria: whether "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social

value."⁶³ To take only the last criterion, the determination of "social value" cannot be made in a principled way. Anything some people want has, to that degree, social value, but that cannot be the basis for constitutional protection since it would deny regulation of any human activity. The concept of social value necessarily incorporates a judgment about the net effect upon society. There is always the problem that what some people want some other people do not want, or wish actively to banish. A judgment about social value, whether the judges realize it or not, always involves a comparison of competing values and gratifications as well as competing predictions of the effects of the activity. Determination of "social value" is the same thing as determination of what human interests should be classed as "fundamental" and, therefore, cannot be principled or neutral.

To revert to a previous example, pornography is increasingly seen as a problem of pollution of the moral and aesthetic atmosphere precisely analogous to smoke pollution. A majority of the community may foresee that continued availability of pornography to those who want it will inevitably affect the quality of life for those who do not want it, altering, for example, attitudes toward love and sex, the tone of private and public discourse and views of social institutions such as marriage and the family. Such a majority surely has as much control over the moral and aesthetic environment as it does over the physical, for such matters may even more severely impinge upon their gratifications. That is why, constitutionally, art and pornography are on a par with industry and smoke pollution. As Professor Walter Berns says "[A] thoughtful judge is likely to ask how an artistic judgment that is wholly idiosyncratic can be capable of supporting an objection to the law. The objection, 'I like it,' is sufficiently rebutted by 'we don't.'"⁶⁴

We must now return to the core of the first amendment, speech that is explicitly political. I mean by that criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country.

A qualification is required, however. Political speech is not any speech that concerns government and law, for there is a category of such speech that must be excluded. This category consists of speech

63. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 418 (1966).

64. Berns, *Pornography vs. Democracy: The Case for Censorship*, *THE PUB. INTEREST*, Winter, 1971, at 23.

advocating forcible overthrow of the government or violation of law. The reason becomes clear when we return to Brandeis' discussion of the reasons for according constitutional protection to speech.

The fourth function of speech, the one that defines and sets apart political speech, is the "discovery and spread of political truth." To understand what the Court should protect, therefore, we must define "political truth." There seem to me three possible meanings to that term:

1. An absolute set of truths that exist independently of Constitution or statute.
2. A set of values that are protected by constitutional provision from the reach of legislative majorities.
3. Within that area of life which the majority is permitted to govern in accordance with the Madisonian model of representative government, whatever result the majority reaches and maintains at the moment.

The judge can have nothing to do with any absolute set of truths existing independently and depending upon God or the nature of the universe. If a judge should claim to have access to such a body of truths, to possess a volume of the annotated natural law, we would, quite justifiably, suspect that the source of the revelation was really no more exalted than the judge's viscera. In our system there is no absolute set of truths, to which the term "political truth" can refer.

Values protected by the Constitution are one type of political truth. They are, in fact, the highest type since they are placed beyond the reach of simple legislative majorities. They are primarily truths about the way government must operate, that is, procedural truths. But speech aimed at the discovery and spread of political truth is concerned with more than the desirability of constitutional provisions or the manner in which they should be interpreted.

The third meaning of "political truth" extends the category of protected speech. Truth is what the majority thinks it is at any given moment precisely because the majority is permitted to govern and to redefine its values constantly. "Political truth" in this sense must, therefore, be a term of art, a concept defined entirely from a consideration of the system of government which the judge is commissioned to operate and maintain. It has no unchanging content but refers to the temporary outcomes of the democratic process. Political truth is what the majority

decides it wants today. It may be something entirely different tomorrow, as truth is rediscovered and the new concept spread.

Speech advocating forcible overthrow of the government contemplates a group less than a majority seizing control of the monopoly power of the state when it cannot gain its ends through speech and political activity. Speech advocating violent overthrow is thus not "political speech" as that term must be defined by a Madisonian system of government. It is not political speech because it violates constitutional truths about processes and because it is not aimed at a new definition of political truth by a legislative majority. Violent overthrow of government breaks the premises of our system concerning the ways in which truth is defined, and yet those premises are the only reasons for protecting political speech. It follows that there is no constitutional reason to protect speech advocating forcible overthrow.

A similar analysis suggests that advocacy of law violation does not qualify as political speech any more than advocacy of forcible overthrow of the government. Advocacy of law violation is a call to set aside the results that political speech has produced. The process of the "discovery and spread of political truth" is damaged or destroyed if the outcome is defeated by a minority that makes law enforcement, and hence the putting of political truth into practice, impossible or less effective. There should, therefore, be no constitutional protection for any speech advocating the violation of law.

I believe these are the only results that can be reached by a neutral judge who takes his values from the Constitution. If we take Brandeis' description of the benefits and functions of speech as our premise, logic and principle appear to drive us to the conclusion that Sanford rather than Brandeis or Holmes was correct in *Gitlow* and *Whitney*.

Benjamin Gitlow was convicted under New York's criminal anarchy statute which made criminal advocacy of the doctrine that organized government should be overthrown by force, violence or any unlawful means. Gitlow, a member of the Left Wing section of the Socialist party, had arranged the printing and distribution of a "Manifesto" deemed to call for violent action and revolution. "There was," Justice Sanford's opinion noted, "no evidence of any effect resulting from the publication and circulation of the Manifesto."⁶⁵ Anita Whitney was convicted under California's criminal syndicalism statute, which forbade advocacy of the commission of crime, sabotage, acts of force or violence or terrorism

65. 268 U.S. at 656.

"as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Also made illegal were certain connections with groups advocating such doctrines. Miss Whitney was convicted of assisting in organizing the Communist Labor Party of California, of being a member of it and of assembling with it.⁶⁶ The evidence appears to have been meager, but our current concern is doctrinal.

Justice Sanford's opinions for the majorities in *Gitlow* and *Whitney* held essentially that the Court's function in speech cases was the limited but crucial one of determining whether the legislature had defined a category of forbidden speech which might constitutionally be suppressed.⁶⁷ The category might be defined by the nature of the speech and need not be limited in other ways. If the category was defined in a permissible way and the defendant's speech or publication fell within the definition, the Court had, it would appear, no other issues to face in order to uphold the conviction. Questions of the fairness of the trial and the sufficiency of the evidence aside, this would appear to be the correct conclusion. The legislatures had struck at speech not aimed at the discovery and spread of political truth but aimed rather at destroying the premises of our political system and the means by which we define political truth. There is no value that judges can independently give such speech in opposition to a legislative determination.

Justice Holmes' dissent in *Gitlow* and Justice Brandeis' concurrence in *Whitney* insisted the Court must also find that, as Brandeis put it, the "speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent."⁶⁸ Neither of them explained why the danger must be "clear and imminent" or, as Holmes had put it in *Schenck*, "clear and present"⁶⁹ before a particular instance of speech could be punished. Neither of them made any attempt to answer Justice Sanford's argument on the point:

[T]he immediate danger [created by advocacy of overthrow of the government] is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a

66. 274 U.S. at 372 (Brandeis, J., dissenting).

67. 268 U.S. at 668; 274 U.S. at 362-63.

68. 274 U.S. at 373.

69. 249 U.S. at 52.

jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency⁷⁰

To his point that proof of the effect of speech is inherently unavailable and yet its impact may be real and dangerous, Sanford might have added that the legislature is not confined to consideration of a single instance of speech or a single speaker. It fashions a rule to dampen thousands of instances of forcible overthrow advocacy. Cumulatively these may have enormous influence, and yet it may well be impossible to show any effect from any single example. The "clear and present danger" requirement, which has had a long and uneven career in our law, is improper not, as many commentators have thought, because it provides a subjective and an inadequate safeguard against the regulation of speech, but rather because it erects a barrier to legislative rule where none should exist. The speech concerned has no political value within a republican system of government. Whether or not it is prudent to ban advocacy of forcible overthrow and law violation is a different question although. Because the judgment is tactical, implicating the safety of the nation, it resembles very closely the judgment that Congress and the President must make about the expediency of waging war, an issue that the Court has wisely thought not fit for judicial determination.

The legislature and the executive might find it wise to permit some rhetoric about law violation and forcible overthrow. I am certain that they would and that they should. Certain of the factors weighted in determining the constitutionality of the Smith Act prosecutions in *Dennis* would, for example, make intelligible statutory, though not constitutional, criteria: the high degree of organization of the Communist party, the

70. 268 U.S. at 669.

rigid discipline of its members and the party's ideological affinity to foreign powers.⁷¹

Similar objections apply to the other restrictions Brandeis attempted to impose upon government. I will mention but one more of these restrictions. Justice Brandeis argued that:

Even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. . . . Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state.⁷²

It is difficult to see how a constitutional court could properly draw the distinction proposed. Brandeis offered no analysis to show that advocacy of law violation merited protection by the Court. Worse, the criterion he advanced is the importance, in the judge's eyes, of the law whose violation is urged.

Modern law has followed the general line and the spirit of Brandeis and Holmes rather than of Sanford, and it has become increasingly severe in its limitation of legislative power. *Brandenburg v. Ohio*, a 1969 per curiam decision by the Supreme Court, struck down the Ohio criminal syndicalism statute because it punished advocacy of violence, the opinion stating:

. . . *Whitney* [the majority opinion] has been thoroughly discredited by later decisions. . . . These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe

71. 341 U.S. at 511.

72. 274 U.S. at 377-78.

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advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁷³

It is certainly true that Justice Sanford's position in *Whitney* and in *Gitlow* has been completely undercut, or rather abandoned, by later cases, but it is not true that his position has been discredited, or even met, on intellectual grounds. Justice Brandeis failed to accomplish that, and later Justices have not mounted a theoretical case comparable to Brandeis'.

* * * * *

These remarks are intended to be tentative and exploratory. Yet at this moment I do not see how I can avoid the conclusions stated. The Supreme Court's constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined and applied. And the requirement of neutrality in turn appears to indicate the results I have sketched here.

73. 395 U.S. at 447.

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Resale Price Maintenance and Consumer Welfare

Robert H. Bork†

The basic issue in this exchange¹ is whether Professors Gould and Yamey have materially weakened the case I made for the legality of resale price maintenance (r.p.m.) desired by a manufacturer who is not in collusion with other manufacturers.² I believe they have not. In this response I will try to demonstrate that their Rejoinder's strictures on welfare economics are irrelevant, its price theory mistaken, and its demands for certainty one-sided and unreasonable.

I. Welfare Economics

My position is that consumer welfare is the only proper criterion for antitrust generally and, specifically, for deciding the legality of r.p.m. I argued this position primarily within the context of judge-made rules under antitrust laws structured like those of the United States,³ but I am quite willing to follow Professors Gould and Yamey into the wider context of legislative decision-making. Discussing both legislatures and courts, Gould and Yamey quite correctly state that "we must distinguish two areas in which the criteria are to apply: (1) in the formulation of antitrust policy; and (2) in supplying the courts (or other implementing agency) with operational rules."⁴ I will make that distinction explicit in the discussion that follows since it is crucial to legitimate government that the division of functions between the two institutions be observed. Whether the legislature or the courts take up the problem of r.p.m., however, I believe r.p.m. of the type under discussion⁵ should be made lawful.

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1. The relevant prior pieces in the exchange are Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division I*, 74 YALE L.J. 775 (1965), and *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373 (1966) [hereinafter cited as *Part I* and *Part II*, respectively]; Gould and Yamey, *Professor Bork on Vertical Price Fixing*, 76 YALE L.J. 722 (1967), and Bork, *A Reply to Professors Gould and Yamey*, 76 YALE L.J. 731 (1967) [hereinafter cited as *Reply*].

2. Professors Gould and Yamey seek, through a disavowal of "any policy prescription," to avoid the burden of sustaining a position of their own. I find the disavowal unpersuasive, and not merely because of the tone of their pieces and the prior writings of Professor Yamey. See, e.g., B. S. YAMEY, *THE ECONOMICS OF RESALE MAINTENANCE* (1964), especially at 129-30. If their "presumption" against r.p.m. is not a "policy prescription," it certainly bears a remarkable family resemblance to one.

3. See Bork, *Part I*, 74 YALE L.J. 775, 829 et seq. (1965), and Bork, *Reply*, 76 YALE L.J. 731, 740-41 (1967).

4. Gould and Yamey, *Professor Bork on Vertical Price Fixing: A Rejoinder*, 77 YALE L.J. 936, 945 (1968) [hereinafter cited as *Rejoinder*].

5. The reader is reminded that we are debating the desirability from the consumer

Resale Price Maintenance

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Resale Price Maintenance and Consumer Welfare

A. *The Standard Welfare Analysis*

I proceed on the conventional hypothesis that antitrust is concerned with competition because a competitive regime provides society with the maximum output that can be achieved at a given time with the resources available. For the sake of clarity, it may be worth restating in simplified form the arguments that underlie this hypothesis.

Under a competitive regime each productive resource tends to move to that employment in which the value of its marginal product, and hence the return paid to it, is greatest. Output is then maximized because there is no possible rearrangement of resources that could increase consumer want satisfaction. Though changing wants and technologies prevent the attainment of this equilibrium, competition permits the closest approximation at any given moment and the continual pursuit of the shifting equilibrium point.

Monopolies (including cartels) interfere with this situation because the unified industry maximizes its net returns by keeping its output below the level which would be attained under a competitive structure. The resulting divergence between price and marginal cost means that the values of the marginal products of the resources employed by the monopolist are higher than they are in competitive industries. Consumers would be better off if resources moved from competitive industries to the presently monopolized industry until the values of marginal products were the same everywhere.

This model does not imply that change is undesirable. As producers achieve greater efficiency in resource use, the society becomes richer. A consumer-oriented antitrust law, therefore, should permit those market structures, agreements, and acts which reflect or create efficiency while prohibiting those which create restrictions of output.⁶

R.p.m. does not eliminate any competition at the manufacturing level and therefore cannot introduce or enlarge any ability to restrict output there. As I have attempted to show in prior pieces, r.p.m. cannot be expected to restrict output at the reseller level for the simple reason that no sane manufacturer would use it if that were its net effect. A

viewpoint of vertical price fixing, that is, r.p.m. which is not the tool of a cartel among resellers or among manufacturers. Hereafter references to "r.p.m." should be taken to indicate only this variety.

6. Though this statement will suffice for the purposes at hand, it is oversimplified. It is possible that movement from a condition in which marginal cost and price were equal to one in which they diverged would, nonetheless, be beneficial to consumers. A monopolistic merger, for example, would be preferable to the maintenance of a competitive structure if it created efficiencies which outweighed the restriction of output. Antitrust, however, does not try to measure directly the relative influences of restriction of output and efficiency in particular situations, but wisely settles for general rules. These rules should, of course, be based upon the probable effects of phenomena of various types.

manufacturer will want r.p.m. only if it increases reseller efficiency in distributing his product, and my prior pieces specified the ways in which r.p.m. can enhance distributive efficiency. It follows from these considerations and the model of welfare analysis sketched out above that r.p.m. desired by a manufacturer should be lawful. I turn now to those objections raised by Gould and Yamey which consist of efforts to show that my welfare criteria are inadequate. These objections have primarily to do with the theory of second best, income distribution, changes in consumer tastes, and the output criterion.

B. *The Theory of Second Best*

Gould and Yamey and I appear to be in agreement that the theory of second best does not provide criteria usable by courts in the decision of individual antitrust cases. It follows, and this seems not in dispute, that any consideration of second best must be at the level of overall rule-making.⁷ We may turn, then, to ask whether the theory of second best provides any guidance to the legislature (or to a court free to act legislatively) in the formulation of rules about r.p.m.

The theory of second best, as Gould and Yamey summarize it, states that so long as there are invulnerable monopolies in an economic system, it may or may not be worthwhile to attack and destroy those monopolies which are vulnerable. The reason is that if we attack vulnerable monopoly *A*, thereby equalizing the value of the marginal products as between *A* and competitive industries, the factors required for *A*'s expansion of output may have come from invulnerable monopoly *B* where their marginal products were higher. We have, if that should be the case, done consumers a disservice.

Gould and Yamey have stated the theory as a caution against assuming that a public policy against restrictions of output necessarily benefits consumers. Whatever weight one assigns to that caution, it clearly does not apply to my contention, grounded in basic price theory, that r.p.m. creates efficient utilization of resources. It is theoretically possible that the more efficient utilization of resources within a firm or an industry might shift demand or resources in such a way as to lessen consumer welfare, but our centuries-long experience of in-

7. The theory of second best, therefore, does not alter the tasks, and should not alter the analysis, of courts charged with applying the Sherman Act to r.p.m. I have argued that the Sherman Act must, for reasons intrinsic to the judicial process, be taken to rest upon standard consumer welfare concepts which are applied through criteria provided by price theory. Bork, *Part I*, 74 *YALE L.J.* 775, 829-47 (1965). I have also contended that this result is indicated by the legislative history of the statute. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 *J. Law & Econ.* 7 (1966).

creases in wealth associated with the alteration of price and the alteration of price is improbable. No legislation against cost-cutting improvements in products because of special products because of special products be different from other products or changing product costs. The theory of second best is

Gould and Yamey have seriously, undercuts the price theory, not minimum price theory, but within an industry, but be an objection from a point against them since result which second best

The theory of second best welfare criteria if my price theory to take advantage of the theory of second best thus has no room

C. *Income Distribution*

Gould and Yamey argue that the theory of second best has eliminated the theory of income distribution may properly rely upon

8. For the sake of complete output. What then is the relevant analysis of three possible assumptions. If the theory leaves out of standard welfare analysis, it suggests a reversal of the theory. There is no one really suggests, but concludes that the proper conclusion concerning the effects of restrictions is the assumption upon which the consumers drop entirely out of the only relevant parties are certain contractual terms and conditions. The issue then is whether they can or cannot of the parties would produce the bargain. This conclusion is correct where, as here, there is no mistake, and where, by definition, the parties are not weighed in where second best is regarded as where r.p.m. restricts output and where the theory of second best is

reseller efficiency in specified the ways in It follows from these is sketched out above be lawful. I turn now which consist of efforts These objections have income distribution, tion.

ement that the theory courts in the decision seems not in dispute, at the level of overall the theory of second to a court free to act p.m.

y summarize it, states lies in an economic ck and destroy those that-if we attack vul- lue of the marginal ries, the factors re- ne from invulnerable higher. We have, if ce.

a caution against as- of output necessarily as to that caution. nded in basic price esources. It is the- of resources within urses in such a way ng experience of in-

ks, and should not affect to r.p.m. I have argued process, be taken to set ough criteria provided have also contended that Bork, *Legislative Intent*

creases in wealth associated with changes in processes and techniques and the alteration of products certainly indicates that such results are improbable. No legislature would be justified in framing a rule against cost-cutting improvements or alterations in the composition of products because of speculations of this sort. Unless r.p.m. is shown to be different from other methods of improving distributive efficiency or changing product composition there is no warrant for raising the theory of second best in this discussion.

Gould and Yamey have in fact introduced a theory which, if taken seriously, undercuts the significance of their conclusions drawn from price theory, not mine. They contend r.p.m. may restrict output within an industry, but second best suggests that restrictions may not be an objection from a welfare standpoint. I do not press this latter point against them since I have doubts about the probability of the result which second best merely shows to be possible.⁸

The theory of second best, therefore, does not alter the appropriate welfare criteria if my price theory is correct. If it is not, I have no wish to take advantage of the escape hatch second best might provide. Second best thus has no relevance to this discussion.

C. Income Distribution

Gould and Yamey apparently suggest that, once the theory of second best has eliminated the criterion of consumer welfare, a legislature may properly rely upon the concept of income distribution to decide

8. For the sake of completeness, let us assume *arguendo* that r.p.m. does usually restrict output. What then is the relevance of the theory of second best? The legislature may make one of three possible assumptions about the impact of second best upon standard welfare analysis. If the theory leaves the legislature convinced that the best general rule is still that of standard welfare analysis, r.p.m. should be illegal. If the legislature thinks the theory suggests a reversal of the rule derived from standard welfare analysis, which I believe no one really suggests, output-restricting r.p.m. should be lawful. If the legislature concludes that the proper counsel of the theory of second best is complete agnosticism concerning the effects of restrictions of output on consumer welfare, and this seems to be the assumption upon which Gould and Yamey operate, then, of course, the interests of consumers drop entirely out of the policy equation. We now have a situation in which the only relevant parties are a manufacturer who does not wish to deal except upon a certain contractual term and at least one reseller who wishes to deal without agreeing to that term. The issue then is whether the state shall leave the parties free to make whatever bargain they can or shall intervene to say the demanded term is illegal because one of the parties would prefer to be relieved of it. I have no doubt that the state should leave the parties free and should enforce the term if it is ultimately incorporated in the bargain. This conclusion rests upon a general presumption in favor of freedom of contract where, as here, there is nothing which can realistically be termed force, fraud, or mistake, and where, by definition in this situation, the interests of third parties are not knowable and hence not weighed. Thus, the only case in which r.p.m. should be unlawful is where second best is regarded as too insubstantial to modify standard welfare analysis and where r.p.m. restricts output. Since I have agreed to these criteria from the beginning, consideration of second best has altered nothing.

the legality of r.p.m. I have shown that the necessary condition to this argument does not exist because the theory of second best does not question the value to consumers of r.p.m. which creates efficiency. Consumer welfare remains a usable criterion for judging r.p.m., therefore, and the field is not cleared for income distribution to assume the role of the decisive criterion by default. In this section, however, I will go further and attempt to demonstrate that the concept of income distribution should not, in any event, play any part in deciding the desirability of r.p.m. It is a subject to be considered after the legality of r.p.m. has been decided on other grounds.

Concern about income distribution may arise either because of a general policy with respect to the acceptable overall range of income disparities in a society or because the society wishes to take away income derived from a particular practice which it wishes to inhibit. The first cause for concern about income distribution tells us nothing about the desirability of r.p.m. A court has no business determining the range of acceptable income disparities in a society and, if it did, would have no reason to select the prohibition of r.p.m. as its means of controlling the disparities. The legislature, worried about the general problem of disparities, has at hand general remedies, such as taxation, subsidization, and welfare programs to achieve its ends. A general incomes policy, in itself, suggests nothing about particular income-producing activities. On such grounds r.p.m. is indistinguishable amidst an infinite range of such activities.

But I suspect Gould and Yamey are focusing on r.p.m. as a practice to be inhibited because of its particular effects. This interpretation of their remarks is reinforced by their reference to the award of damages to a "wronged party" and the footnote which apparently suggests theft and forgery as analogies.⁹ The fallacy here lies in the assumption that the policy-making body usually selects those acts which are to be made illegal or for which damages may be claimed according to some standard of income distribution. Income distribution, by itself, does not distinguish between "fencing" stolen goods and normal brokering as means of gaining income. Theft and forgery, to take Gould and Yamey's examples, are not defined as wrongs because they alter income distribution but because they have other effects which are regarded as deleterious. If r.p.m. creates efficiency and so increases society's wealth, there is no more reason for a legislature to classify it as an undesirable practice, analogous to a tort or crime, than there is to class

9. Gould and Yamey, *Rejoinder*, 77 YALE L.J. 936, 947 & n.22 (1963).

sify the more efficient result in itself simply because it injures consumers and of income distribution may suggest a provision preventing men from deriving

Thus, price theory, welfare allocation, and welfare allocation upon consumers of r.p.m.¹⁰ The subject after that decision is the present discussion.

D. Changes in Taste

Professors Gould and Yamey no more than this: "But is, for that reason, considered rigorously and will be caught out because practices cannot be measured by standard welfare analysis. I will not have further claimed the position on this point."¹¹

In the first place, it is understood the thrust of the quote. I have viewed the evidence of an economic good etc.—which is just as

10. Only in the special case of restrict output and that it is utterly unknowable will there be the concept of income distribution for the manufacturer. The concept of income distribution is not applicable, and therefore, there are an infinite number of attempts to prohibit the special case seems open to the freedom of contract mental event, affect may argue creating efficiency.

11. Gould and Yamey, *Rejoinder*, 77 YALE L.J. 936, 947 & n.22 (1963).

12. *Id.* 938.

necessary condition to this of second best does not which creates efficiency. for judging r.p.m., there- distribution to assume the this section, however, I at the concept of income part in deciding the de- erred after the legality of

rise either because of a overall range of income wishes to take away in- ch it wishes to inhibit. istribution tells us nothing no business determining a society and, if it did, n of r.p.m. as its means worried about the gen- remedies, such as taxa- chieve its ends. A gen- hing about particular r.p.m. is indistinguish-

on r.p.m. as a practice This interpretation of o the award of damages ch apparently suggests lies in the assumption e acts which are to be ned according to some ution, by itself, does and normal brokering y, to take Gould and because they alter in- effects which are re- and so increases soci- ture to classify it as an e, than there is to clas-

sify the more efficient rearrangement of machinery as a thing wrong in itself simply because it produces income. If r.p.m. restricts output, it injures consumers and may properly be made illegal. The subject of income distribution then becomes relevant for the first time and may suggest a provision for the recovery of damages as a way of preventing men from deriving income from antisocial conduct.

Thus, price theory, which indicates the effect of r.p.m. on resource allocation, and welfare analysis, which indicates the effect of resource allocation upon consumers, control the decision as to the desirability of r.p.m.¹⁰ The subject of income distribution becomes relevant only after that decision is made. Hence the topic has no relevance to the present discussion.

D. Changes in Taste

Professors Gould and Yamey offer an argument which amounts to no more than this: "Bork has relied on standard welfare analysis. He is, for that reason, confined to policy prescriptions which can be derived rigorously and with certainty from that model. He is, therefore, caught out because promotional activities which change consumers' tastes cannot be measured on a stable yardstick derived entirely from standard welfare analysis."¹¹ There are some non sequiturs in that argument, but I will deal with it in its own terms. Gould and Yamey have further claimed that I have not offered argument but only assertion on this point.¹² That charge I cannot accept.

In the first place, it is quite clear that Gould and Yamey have misunderstood the thrust of my argument and of the very paragraph they quote. I have viewed the reseller activities induced by r.p.m. as providing an economic good—information, entertainment, convenience, etc.—which is just as much an output of the economy as any other

10. Only in the special case in which the legislature determines both that r.p.m. usually restricts output and that the theory of second best leaves the effect of such restrictions utterly unknowable will the concept of consumer welfare become inoperative. But even here the concept of income distribution would decide nothing. R.p.m. creates larger incomes for the manufacturer and most resellers, and perhaps less income than would accrue in r.p.m.'s absence for some resellers. This fact seems to say nothing about r.p.m.'s desirability. The arguments in the text about the handling of overall income disparities seem applicable, and there seems no way to define such shifts in income as in themselves wrong. There are an infinite number of shifts due to commercial practices which we do not attempt to prohibit when consumer welfare is not thought to be involved. This special case seems open to solution only by reference to the presumption in favor of freedom of contract mentioned note 8 *supra*. But the outcome of this case does not, in any event, affect my argument which rests on the identification of r.p.m. as a means of creating efficiency.

11. Gould and Yamey, *Rejoinder*, 77 *YALE L.J.* 936, 938-39 (1968).

12. *Id.* 938.

product (or service).¹³ R.p.m., like vertical market division, is the means by which the manufacturer induces reseller provision of this product by making sure that the reseller can recover the product's cost. The process is closely analogous to the social recognition of property rights as a means of inducing economic activities. Contract law delegates to private persons the power to create property rights because of their superior knowledge of the efficiencies to be gained in particular situations. R.p.m. is best viewed as an instance of this general principle. The net effect of r.p.m. is to increase the amount of an existing product (or, more accurately, to enlarge the information component, for example, of a composite product consisting of a physical item and information about the item) which is offered to consumers. This analysis does not involve changes in consumer tastes any more than the offering of a greater amount of any existing product (or the change of any product's composition) changes tastes. The situation, therefore, is measurable by the "stable yardstick" Gould and Yamey require. If some consumers prefer to purchase the additional information, or other product, offered jointly with the physical item through r.p.m., the output of the economy has increased.

Gould and Yamey have not met this analysis, though the view of r.p.m. as changing the composition of products offered consumers appears not merely in the paragraph of my Reply they cite but in my prior pieces in this series.¹⁴ So far as I can tell, Gould and Yamey deal with the reseller activity induced by r.p.m. as though it did not count as an economic output but was instead merely something that changes tastes. I am not sure that this view of promotional activities is ultimately comprehensible, though it incorporates a common mode of speech. When a youth has classical music explained to him so that he comes to prefer Bach to the Beatles, have his tastes been changed or has the new information enabled him to relate classical music more effectively to existing tastes? It seems to me to depend upon whether "tastes" are defined as quite specific preferences or as basic psychologi-

13. I alluded to this view of promotional service as a product in my discussion of promotional activity as changing the composition of the product offered. It is an extract from this passage which Gould and Yamey quote and attack. Bork, *Reply*, 76 *YALE L.J.* 731, 733-34 (1967). Moreover, in Bork, *Part II*, 75 *YALE L.J.* 373 (1966), I repeatedly analyzed market division and price fixing as means of providing information and services which should be recognized as economic outputs, and even referred to r.p.m. as a means of securing a uniform product which included sales effort as part of the product. *Id.* at 454-56. See generally Stigler, *The Economics of Information*, 69 *J. POL. ECON.* 213 (1961); Telser, *Supply and Demand for Advertising Messages*, 56 *AMER. ECON. REV. PAPERS* 457 (1966).

14. See note 13 *supra*.

cal traits. If the former, the effect of changing taste in a rigorous way of judging it, perhaps never, occur, and the reaction induced by r.p.m. is not afraid that Gould and Yamey are in taste," that is so unre-

discussion. But I will assume, for the sake of quite specific preference shifts which induces such shifts in output. This pair of assumptions is obviously to derive from the statement that consumers are always better off with more preferences. It is impossible to compare the outputs of the same economy with different distributions of tastes. This is not an appropriate public policy question, but that the attempted consumer welfare and sometimes fail, should be.

I know of no ultimate statement that tastes are best and changes in tastes make that assumption invalid. Nor does the fact that tastes self-interest differentiate it from persuasion. The appropriate question is to which consumer sovereignty (the drugs and the like) would persuade and consumers free to respond in a particular way to consumer welfare other than.

There is a further point that should be made. Apart from what is said above, the fact is that there are forms in our society. If r.p.m. is more economical performance in singling it out for prohibition. My answer to Gould and Yamey is that product or output made possible to state, on the basis that consumers are better off. Should

market division, is the reseller provision of this to recover the product's social recognition of promotional activities. Contract law create property rights beneficiaries to be gained in an instance of this general increase the amount of an large the information content consisting of a physical is offered to consumers. consumer tastes any more existing product (or the tastes. The situation, "stick" Gould and Yamey the additional information the physical item through based.

analysis, though the view of products offered consumers apply they cite but in my, Gould and Yamey deal though it did not count something that changes promotional activities is ultimately a common mode of obtained to him so that he tastes been changed or late classical music more to depend upon whether as or as basic psychological.

product in my discussion of product offered. It is an extract from Bork, *Reply*, 76 YALE L.J. 373 (1966). I repeatedly analyzing information and services, referred to r.p.m. as a means as part of the product. *Id.* information, 69 J. POL. ECON. 213 56 AMER. ECON. REV. PAPERS

cal traits. If the former, every new product or changed product has the effect of changing tastes and standard welfare analysis provides no rigorous way of judging it. If the latter, changes in taste infrequently, perhaps never, occur, and it is certainly unlikely that reseller promotion induced by r.p.m. is capable of changing such basic tastes. I am afraid that Gould and Yamey are operating with a concept, "changes in taste," that is so unrefined as to be practically useless in this discussion.

But I will assume, for the moment, that "changes in taste" refers to quite specific preference shifts and that the activity ("promotion") which induces such shifts is not in itself to be counted as an economic output. This pair of assumptions does indeed make it impossible rigorously to derive from the standard welfare model a conclusion that consumers are always better off after promotional activity has shifted their preferences. It is impossible to compare the value of two different outputs of the same economy which are responses to two different distributions of tastes. This observation, however, has little to do with appropriate public policy toward r.p.m. Two considerations indicate that the attempted consumer persuasion, which will sometimes succeed and sometimes fail, should be permitted to proceed.

I know of no ultimate standard by which it can be said that existing tastes are best and changes should be inhibited. We certainly do not make that assumption in the not-explicitly-economic sector of our lives. Nor does the fact that commercial persuasion is motivated by self-interest differentiate it from much, perhaps most, non-commercial persuasion. The appropriate rule (when we are dealing with products as to which consumer sovereignty is deemed desirable, i.e., not addictive drugs and the like) would seem to be to leave sellers free to try to persuade and consumers free to respond or not. Whether or not consumers respond in a particular case, I know of no acceptable guide to consumer welfare other than the consumers' judgment of the matter.

There is a further point about the consistency of public policy that should be made. Apart from the merits of any of the arguments set out above, the fact is that we permit promotional activity in myriad forms in our society. If r.p.m. has as one of its major functions the more economical performance of that activity, I can see no rationality in singling it out for prohibition.

My answer to Gould and Yamey, then, is that I have analyzed the product or output made possible by r.p.m. in a way which makes it possible to state, on the basis of the standard welfare model, that consumers are better off. Should they reject that analysis, however, they

have not shown promotion to be harmful, only that nothing rigorous can be said of it in terms of the welfare model. I have shown, I believe, the reasons why, in that eventuality, public policy should be to permit r.p.m. The change-in-taste concept turns out to alter nothing.

E. *The Output Criterion*

Since Gould and Yamey understood that I was grounding my argument in welfare theory, and since that theory refers to the output of the economy as a whole, I am surprised that they managed also to believe that my output criterion related to the individual firm rather than to the economy as a whole. The misunderstanding is of no practical significance, however, for they and I have consistently argued the issues relevant to resource allocation in the total economy, i.e., whether or not r.p.m. is likely to create restrictions of output.

To dispel any possible lingering confusion I will summarize the method by which a court should apply standard welfare assumptions. The judge should apply the concepts of price theory to the agreement, structure, or activity called into question in order to determine whether it is likely to create a restriction of output (create or increase a divergence between price and marginal cost). If not, the presumption is that the agreement or activity was motivated by the desire to achieve a more efficient utilization of resources. The judge may wish to go on, as I have in these articles, to understand how more efficient resource use is achieved, but in strict logic he need not. The presumption is that the creation of or increase in a divergence between price and marginal cost restricts the output of the industry and, more importantly, of the economy as a whole, while more efficient resource use increases both outputs. In some cases both effects may be present and the judge will have to estimate roughly the net effect. This is not our present case, however, for my argument is that the r.p.m. desired by a manufacturer not in collusion with other manufacturers has only the effect of creating efficient resource use. Inferences from price theory to welfare conclusions are proper and made necessary by the fact that the court has no feasible means of measuring directly the sizes of efficiencies, divergences between marginal costs and prices, or outputs.

The result of this sorting out of Gould and Yamey's suggested qualifications to standard welfare analysis is to perceive that when examined with any precision these qualifications evaporate as guides to public policy with respect to r.p.m. The standard welfare model which I outlined in the beginning of this piece appears to be entirely adequate to the task of judging r.p.m. The next question is whether

Retail Price Maintenance

within that model, the arguments or weakens the case.

II. Price Theory

Professors Gould and Yamey, in the case I made for r.p.m., claim that to them to outweigh the arguments seem valid, I will not attempt to rebut the arguments of r.p.m. if they were a rehabilitation of the fourfold test, then with other specific

A. *The Four Counter-Arguments*

The first Gould and Yamey claim is that advertising restricts output while r.p.m. increases it. To show that advertising restricts output while r.p.m. increases it, I pointed out. There was no limitation on output. I responded by pointing out that marginal cost since any restriction on output at one time, reduces output. Furthermore, the seller's incentive teaches him their restriction.

It now appears, however, that the definition of fixed costs is not correct. They cannot be varied in the short run. In my mind gratuitously attributed to them, comes, according to Gould and Yamey, a hypothetical manufacturer's cost is not merely inconsistent with reality and marginal costs can be made to vary.

We are asked to imagine a manufacturer who selects the "best" advertising expenditure as a "given" and then makes beautifully sequential decisions which

15. Gould and Yamey, *Rejoinder*.

only that nothing rigorous. I have shown, I believe, policy should be to permit to alter nothing.

I was grounding my argument refers to the output of they managed also to be the individual firm rather understanding is of no practical consequence consistently argued the the total economy, i.e., restrictions of output.

tion I will summarize the standard welfare assumptions. The theory to the agreement, in order to determine output (create or increase cost). If not, the presumption motivated by the desire to efficiency. The judge may wish to understand how more efficient the need not. The presumption of a divergence between price in the industry and, more important, more efficient resource use effects may be present and net effect. This is not our point that the r.p.m. desired by manufacturers has only the differences from price theory to be necessary by the fact that the directly the sizes of efficiency and prices, or outputs.

and Yamey's suggested qualification to perceive that when conditions evaporate as guides to standard welfare model which appears to be entirely adequate. The next question is whether

within that model, the application of the concepts of price theory supports or weakens the case for r.p.m. I turn to that question now.

II. Price Theory

Professors Gould and Yamey have not undertaken to attack the entire case I made for r.p.m. but to pose certain objections which seem to them to outweigh the affirmative case. Since these objections do not seem valid, I will not attempt to estimate what would be the pros and cons of r.p.m. if they were valid. I will deal first with the attempted rehabilitation of the four Gould and Yamey counter-examples and then with other specific objections.

A. The Four Counter-Examples

The first Gould and Yamey counter-example consisted of an attempt to show that advertising differed from promotion induced through r.p.m. because advertising is asserted to be a fixed cost which does not affect output while r.p.m. increases marginal costs and does affect output. There was no limitation on this counter-example as originally put and I responded by pointing out that advertising would also be a marginal cost since any seller plans his advertising expenditures and output at one time, recognizing the interdependence of his decisions. Furthermore, the seller varies his expenditures and his output as experience teaches him their relationship more precisely.

It now appears, however, that Gould and Yamey are using a novel definition of fixed costs. Such costs are not identified by the fact that they cannot be varied in the relevant time period but by a state of mind gratuitously attributed to the entrepreneur. Advertising becomes, according to Gould and Yamey, a fixed cost simply because a hypothetical manufacturer insists upon so regarding it. This argument is not merely inconsistent with standard price theory, but is also divorced from reality and constitutes a device by which any and all marginal costs can be made fixed when that suits the debater's purposes.

We are asked to imagine a world in which a manufacturer is able to select the "best" advertising campaign without considering its relation to his sales and is inclined thereafter to take his level of advertising expenditure as a "given."¹⁵ One can only note that this man has a beautifully sequential mind, one which keeps in separate compartments decisions which crucially affect each other. In any world outside

15. Gould and Yamey, *Rejoinder*, 77 YALE L.J. 936, 939-40 (1968).

that of the hypothetical he would doubtless have to be accompanied by a guardian. Granted an equivalent freedom to postulate irrational economic behavior, I can show that advertising may be the *only* variable cost. My manufacturer decides first upon his "best" output and then regards that factor as "given." Henceforward, the only expenditure he will vary is his advertising. Thus, paralleling Gould and Yamey, we see that advertising is variable and wages, depreciation, raw materials, electricity, and so on and on, are all fixed costs and do not affect output. Postulating normal intelligence in the manufacturer, however, we would expect him to determine his advertising campaign, its effect upon his sales, and his proper output jointly. Advertising expenditure is then a marginal cost.¹⁶

It should be noted, moreover, that if we accepted Gould and Yamey's hypothetical as a possibly accurate version of reality, the result would be to show that, on this ground at least, r.p.m. is preferable to advertising. It is in the social interest that output should vary with real marginal costs. Gould and Yamey suggest that r.p.m. has that effect automatically but advertising may not because the manufacturer is free to disregard the impact of advertising on his sales. If that were significant, it would merely mean that advertising leaves the manufacturer free to misallocate resources by failing to regard it as what it is, a variable or marginal cost.

The first counter-example is either unrelated to reality or demonstrates the social superiority, in this respect, of r.p.m. to an advertising campaign.

The second and third counter-examples are sought to be rehabilitated by the curious maneuver of saying that my analysis of them rests upon an assumption of perfect ease of entry into all industries. This is simply not the case, as a reading of my prior response will show.¹⁷

The second counter-example purported to demonstrate that all the manufacturers in an industry might individually choose r.p.m. only to discover that they were all worse off for it. Without mentioning entry, I pointed out that the situation would not be stable because it would then be in the interests of some manufacturers and resellers to abandon r.p.m. This is true of the manufacturers and resellers already

16. Advertising can be made into a fixed cost, of course, by viewing it all as past advertising whose results were not as expected. Then the manufacturer would make new price and output decisions and would be unable to vary the past advertising expenditure, but that is certainly not significant. All past expenditures are fixed in this sense. Even past payments for promotional activities through r.p.m. are fixed costs.

17. Bork, *Reply*, 76 YALE L.J. 731, 734-36 (1967).

in the industry. If I had pointed out that the situation made entry more attractive, I would have stood refuted without

The third counter-example shows that a monopoly entry of large-scale resale price maintenance or difficulty of entry is not an effective tool for the purpose. Under these conditions, r.p.m. would be neutral or make a point leaves the second to them precisely when

The fourth counter-example shows that r.p.m. by oligopolists is not a competitive way of life. I pointed out that this competition which we practice had serious consequences. Any event less than a collusive use of r.p.m. is not profitable than its use by manufacturers, a case unlikely.¹⁸

The whole counter-example shows that oligopolists are able to win and are then able to profit margins which others, they hardly. by parallel and non-price concessions to find very much that this is common as some commercial transactions of the sort just which cost more and

18. Gould and Yamey, n.10 (1967). I do not understand withdrawal of that agreement as evidence that the non-collusive use of r.p.m. is less profitable than its collusive use by a manufacturer. I need not rehearse the evidence of the collusive use of r.p.m. by Bork, *Part II*, 75 YALE L.J.

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in the industry. If I had discussed entry, I might properly have pointed out that the situation envisaged by Gould and Yamey would have made entry more attractive, but I believe the counter-example to stand refuted without reference to entry.

The third counter-example was offered by Gould and Yamey to show that a monopolist manufacturer might use r.p.m. to slow the entry of large-scale resellers. My response did not posit any degree of ease or difficulty of entry but was and is that r.p.m. would not be an effective tool for the purpose specified since, whatever the entry conditions, r.p.m. would not make them more difficult but would either be neutral or make entry more attractive. The clarification of this point leaves the second and third counter-examples and my answers to them precisely where they were after the last exchange.

The fourth counter-example imagined the non-collusive use of r.p.m. by oligopolists to lessen the unsettling effects upon their non-competitive way of life of price competition at the reseller level. I pointed out that this tactic would introduce service and promotional competition which would lessen the benefits to be derived, that the practice had serious costs, and that the benefits to be derived were in any event less than would be attained through collusion. The non-collusive use of r.p.m. for this purpose, therefore, seems even less profitable than its use as a tool for policing actual collusion between manufacturers, a case which Gould and Yamey had agreed was unlikely.¹⁸

The whole counter-example is unrealistic in any event. If the oligopolists are able to work out techniques of this sort without collusion, and are then able to withstand continued reseller pressure for greater profit margins which would lead to pushing one product over the others, they hardly need the device of r.p.m. They can equally well, by parallel and non-collusive oligopolistic behavior, refuse to give price concessions to finance the competition at the retail level. I doubt very much that this tight formation flying without collusion is as common as some commentators suppose, but if it is, it should lead to solutions of the sort just mentioned rather than to elaborate schemes which cost more and accomplish less.

18. Gould and Yamey, *Professor Bork on Vertical Price Fixing*, 76 YALE L.J. 722, 725 n.10 (1967). I do not understand the distinction made in or the basis for their conditional withdrawal of that agreement in *Rejoinder*, 77 YALE L.J. 936, 942 (1968). It seems to me obvious that the non-collusive use of r.p.m. as a means of suppressing competition is less likely than its collusive use by a manufacturers' cartel. See Bork, *Reply*, 76 YALE L.J. 731, 737-38 (1967). I need not rehearse here the arguments indicating the improbability of even the collusive use of r.p.m. by manufacturers wishing to inhibit defection from a cartel. See Bork, *Part II*, 75 YALE L.J. 373, 411-15 (1966).

B. *The Side Effects of R.P.M.*

Gould and Yamey point out that the manufacturer using r.p.m. may have effects upon other goods sold by the same resellers and hence effects upon the resellers and upon consumers.¹⁹ Gould and Yamey discuss these side effects as if they were both inevitably detrimental and unique to r.p.m. In fact, they are neither.

The beneficial aspects of r.p.m. for resellers are apparent. When a manufacturer finds r.p.m. profitable, most of his resellers will also find it profitable as to his goods. This is a plus factor Gould and Yamey do not mention which will offset the detrimental side effects they posit. But there is no basis, in any event, for their supposition that the side effects themselves should usually be detrimental. They suppose it likely that resellers constrained by r.p.m. as to some products will be able to attract fewer customers to their stores and so will sell less of other products. On the contrary, if the r.p.m. succeeds by inducing successful promotional activity, as it must if the manufacturer is to find it worthwhile, more persons will be attracted to that store, and the reseller's prospects for selling other goods will be enhanced. This last remark is speculative but less so than the adverse possibilities imagined by Gould and Yamey. It is inconceivable that the manufacturer using r.p.m. should wish to weaken his outlets through the side effects of r.p.m., and certainly resellers who were injured would make their supplier aware of that fact.

Gould and Yamey's ruminations about the possible side effects of r.p.m. are idle, in any event, since almost all methods of distribution, as well as of production, have such effects. Both national advertising and reseller price cutting, for example, clearly have side effects upon resellers' sales of other products, and these effects may be either beneficial or harmful. Side effects occur when the manufacturer pays the salaries of salesmen for the promotion of his products in retail outlets, gives his resellers promotional materials, or contributes to reseller advertising of his products. No reason has been advanced why r.p.m.'s side effects are either usually harmful or different from any other

19. Gould and Yamey, *Rejoinder*, 77 YALE L.J. 936, 942-44 (1968). Some of the side effects imagined by Gould and Yamey seem impossible. They suppose, for example, that r.p.m. may be less beneficial than a manufacturer using it expects because "resellers [may] use the additional margin to cut prices of other goods or to provide services in respect of other goods." *Id.* 944 n.19. If it paid resellers to cut the prices of other goods, they would do so in any event. Additional income from price-maintained products is no more relevant to that decision than additional income from stock investments. Precisely the same analysis applies to the provision of promotional services with respect to other products.

distributive strategy. It is Yamey seriously.

C. *Manufacturer Super*

I am at a loss to know that r.p.m. involves, compared to other. So does every company. It is a ubiquitous phenomenon and has great economic integration. Such efficiency.²⁰ The analogy to management decisions,

III. The Question of

Professors Gould and Yamey, the appropriate public policy on the issue of the standard and I think it proper to

In my original piece, I had no reason to think r.p.m. was the contrary, there seemed to be of an activity (read "that consumers are wise of the probabilities should do not contend that I further analysis cannot that my arguments have Yamey. But Gould and Yamey repeatedly they use I approaching a mathematical in every imaginable prove the proposition changed) the divergent

I confess an inability and final nature. But unreasonable. I have

20. See R. Coase, *The Firm, the Market, and the Relational Contract*, and Boulding eds. 1952.

21. Gould and Yamey.

resellers are apparent. When a most of his resellers will also find plus factor Gould and Yamey do experimental side effects they posit their supposition that the side detrimental. They suppose it m. as to some products will be r:stores and so will sell less of ne r.p.m. succeeds by inducing must if the manufacturer is to be attracted to that store, and goods will be enhanced. This an the adverse possibilities im- ceivable that the manufacturer outlets through the side effects ere injured would make their

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942-44 (1968). Some of the side effects we suppose, for example, that r.p.m. exists because "resellers [may] use it or to provide services in respect of but the prices of other goods, thereby maintained products is no more than stock investments. Precisely the same services with respect to other

distributive strategy. It is difficult to take this argument of Gould and Yamey seriously.

I am at a loss to know why Gould and Yamey think it significant that r.p.m. involves control by one firm of one of the activities of another. So does every contract or working arrangement between two firms. It is a ubiquitous form of integration known as contract integration and has great economic advantages in many situations over ownership integration. Such control is often essential to the creation of efficiency.²⁰ The analogy between the use of r.p.m. and other normal management decisions, therefore, is not false but exact.

Professors Gould and Yamey and I have engaged in a discussion of the appropriate public policy toward r.p.m. Their latest piece raises the issue of the standard of proof to which discussants are to be held and I think it proper to close with a few words on that subject.

In my original piece, I attempted to demonstrate that there seems no reason to think r.p.m. would create restrictions of output but, on the contrary, there seem many reasons to think it enables the provision of an activity (read "service" or "product," if that seems preferable) that consumers are willing to pay for. I have argued the case in terms of the probabilities shown by the application of basic price theory. I do not contend that I have proved the case for r.p.m. in the sense that further analysis cannot possibly show me to be wrong. I do maintain that my arguments have not been answered by Professors Gould and Yamey. But Gould and Yamey seem to require something more of me; repeatedly they use language which seems to demand something approaching a mathematical demonstration that my case for r.p.m. holds in every imaginable circumstance. They insist, for example, that I prove the proposition: "R.p.m. always decreases (or else leaves unchanged) the divergence between price and marginal cost."²¹

I confess an inability to supply proof of the requisite mathematical and final nature. But the demand that I should is wholly unfair and unreasonable. I have offered an analysis based on conventional welfare

20. See R. Coase, *The Nature of the Firm*, in READINGS IN PRICE THEORY 331 (Stigler and Boulding eds. 1952).

21. Gould and Yamey, *Rejoinder*, 77 YALE L.J. 935, 916 (1968).

and price theory. Gould and Yamey have failed to shake that analysis in any respect. That should be enough. I do not suppose that anyone has demonstrated rigorously that plant investment, research and development, the hiring of salesmen, or any other hopefully profitable activity that businessmen undertake "always decreases (or else leaves unchanged) the divergence between price and marginal cost." It seems to me sufficient in such matters to show that there is no coherent theory which leads one to predict a restriction of output and that there is a coherent theory which predicts an efficient use of resources.

To require more than this is to create a presumption against every business activity until someone has rigorously demonstrated that never, under any circumstances, could that activity have an adverse impact. Policy discussion cannot intelligently be carried on under such rules. I would ask Professors Gould and Yamey to take to heart their own excellent dictum: "In advocating policy one must, of necessity, make do with what theoretical and empirical knowledge is available. We may bemoan our incomplete knowledge, but we shall wait forever if we wait on complete knowledge before tackling practical questions."²² Measured by that standard, I submit, the affirmative case for r.p.m. has been demonstrated.

22. *Id.* 945.

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COLUMBIA LAW REVIEW

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THE GOALS OF ANTITRUST: A DIALOGUE
ON POLICY

In 1890, Senator John Sherman described the act which now bears his name as a "bill of rights, a charter of liberty."[†] Today, although a broad consensus has developed in favor of at least some regulation, a debate continues over the purposes of antitrust legislation and over the implementation of antitrust policy. Concern about the direction of antitrust doctrine has been aroused by recent decisions in the Supreme Court on mergers, Robinson-Patman violations and business torts.

Professors Bork and Bowman of the Yale Law School fear that the Sherman and Clayton Acts are being enforced in a way that is "anticompetitive," and are particularly critical of decisions dealing with mergers and vertical integration; Columbia Professors Blake and Jones reject the economic postulates of "these new critics of antitrust," and argue substantially in favor of existing trends. Because of the fundamental importance of the issues involved, the Editors of the COLUMBIA LAW REVIEW have invited these eminent scholars to continue a dialogue, initiated in FORTUNE magazine,[‡] on the purposes of our antitrust policy and the methods by which these purposes may be achieved.

THE CRISIS IN ANTITRUST

ROBERT H. BORK* AND WARD S. BOWMAN, JR.**

Long-standing contradictions at the root of antitrust doctrine have today brought it to a crisis of policy. From its inception with the passage of the Sherman Act¹ in 1890, antitrust has vacillated between the policy of preserving competition and the policy of preserving competitors from their more energetic

[†] 21 CONG. REC. 2461 (1890).

[‡] The dialogue will be presented in five parts: (1) a statement of position by Professors Bork and Bowman; (2) a critique by Professors Blake and Jones; (3) separate rebuttals to the Blake-Jones critique by Professor Bork and (4) then Professor Bowman; (5) a rebuttal by Professors Blake and Jones. Although based on articles that first appeared in the December 1963 and August 1964 issues of *Fortune* magazine, the first two segments of the dialogue have been expanded, revised, and documented.

* Associate Professor of Law, Yale Law School. B.A., University of Chicago, 1948; J.D., 1953.

** Professor of Law and Economics, Yale Law School. A.B., University of Washington, 1933.

¹ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1959).

and efficient rivals. It is the rapid acceleration of the latter "protectionist" trends in antitrust that has brought on the present crisis. Anti-free-market forces now have the upper hand and are steadily broadening and consolidating their victory. The continued acceptance and expansion of their doctrine, which today constitutes antitrust's growing edge, threaten within the foreseeable future to destroy the antitrust laws as guarantors of a competitive economy.

The situation would be sufficiently serious if antitrust were merely a set of economic prescriptions applicable to a sector of the economy. But it is much more than that; it is also an expression of a social philosophy, an educative force, and a political symbol of extraordinary potency. Its capture by the opponents of the free market is thus likely to have effects far beyond the confines of antitrust itself.

The very existence of this crisis—and the basic societal changes it portends—is not generally understood. Even the business community, which is most immediately affected, though it is conscious of hostility, appears to understand neither the nature nor the immediacy of the threat. To be sure, businessmen and their lawyers may frequently be heard inveighing against some particular action of the courts or of the governmental enforcement agencies. Calls from industry for mutual reasonableness and understanding between government and business are common. But such responses to the situation are dangerously beside the point. The problem is not created by a temporary aberration of the courts or the unreasonableness of a particular set of officials who can be jollied out of it or, if not, who will eventually be replaced with a more reasonable set. The danger arises from a fundamental and widespread misconception of the nature and virtues of the competitive process. This misconception, coupled occasionally with real hostility toward the free market, exists in varying degrees in the courts, in the governmental enforcement agencies, and in the Congress, with the result that in crucial areas the doctrines of antitrust are performing a 180-degree turn away from competition.

The nature of the present crisis in the law can be illustrated by comparing the law concerning price-fixing and the developing law of mergers. Their difference reflects the schizophrenia afflicting basic antitrust policy.

The rule that price-fixing and similar cartel arrangements are illegal, *per se*, that is, incapable of legal justification, must be ranked one of the greatest accomplishments of antitrust. Though its wisdom may seem obvious now, it was not always apparent that this was the correct rule or that the courts would adopt it. The first price-fixing case to reach the Supreme Court was brought by the government under the Sherman Act against the Trans-Missouri Freight Association, an association of railroads that agreed upon rates to be charged shippers.² Both the trial court and the court of appeals

2. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

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agreed that the government provided for "reasonable" and "unreasonable" restraints. The court rejected this view. If the "business" of the price agreement under the Sherman Act might easily be a judicial version of the Court's decision in *Trans-Missouri*, the government would be helpless to defend its case against "competition"? Would not the mercy of the more enlightened arguments for judicially controlling the power of the Taft, writing for the Court in *the Addyston Pipe & Steel*, to "set sail on a sea of doubt" and the power to say . . . how much is not. The Court has hewed to the

The reason behind the achievements of antitrust law is to preserve competition. It provides society with the time with the resources and the competitive resources are combined for greater profits through to that employment where return paid to it, is great rearrangement of resource output. Competition is the prosperous society and the actions what goods and services.

Price-fixing is antisocial. When competition is necessarily restricted, they necessarily restrict resources in the industry to other employment where high. Over time, of course, new firms are attracted by the only way for the cartel.

3. *United States v. Trans-Missouri Freight Ass'n*, 58 Fed. 58 (8th Cir. 1897).

4. *United States v. Addyston Pipe & Steel*, 175 U.S. 211 (1899).

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agreed that the government's bill should be dismissed because the agreement provided for "reasonable" rates and the new Sherman Act only struck down unreasonable restraints of trade.³ The Supreme Court, by a five-to-four vote, rejected this view. If one vote had been cast the other way the "reasonable-[✓]ness" of the price agreed upon would have determined legality and the Sherman Act might easily have become not the symbol of the free market but a judicial version of the NRA. To many observers at the time, the Supreme Court's decision in *Trans-Missouri* seemed disastrous. Were businessmen to be helpless to defend themselves by reasonable agreement from "ruinous competition"? Would not the small and perhaps less efficient producer be at the mercy of the more efficient? The Supreme Court majority rejected such arguments for judicially supervised cartels. A year later William Howard Taft, writing for the Circuit Court of Appeals, rejected a similar defense in the *Addyston Pipe & Steel* case, warning that to adopt such a standard was to "set sail on a sea of doubt" and that courts that had done it had "assumed the power to say . . . how much restraint of competition is in the public interest, and how much is not."⁴ Since then, with very few exceptions, the Supreme Court has hewed to the rule of per se illegality for cartel agreements.

The reason behind the characterization of this rule as one of the supreme achievements of antitrust goes straight to fundamentals. Why should we want to preserve competition anyway? The answer is simply that competition provides society with the maximum output that can be achieved at any given time with the resources at its command. Under a competitive regime, productive resources are combined and separated, shuffled and reshuffled in search for greater profits through greater efficiency. Each productive resource moves to that employment where the value of its marginal product, and hence the return paid to it, is greatest. Output is maximized because there is no possible rearrangement of resources that could increase the value to consumers of total output. Competition is desirable, therefore, because it assists in achieving a prosperous society and permits individual consumers to determine by their actions what goods and services they want most.

Price-fixing is antisocial precisely because it lessens the total output of society. When competitors agree on higher prices and put them into effect, they necessarily restrict output and so reduce total wealth. Some of the resources in the industry are then unused or are necessarily transferred to to other employment where the value placed on them by consumers is not as high. Over time, of course, such resources will move back into the industry as new firms are attracted by the higher rate of return there and move in. Usually the only way for the cartels to prevent this result is to persuade the govern-

³ *United States v. Trans-Missouri Freight Ass'n*, 53 Fed. 440 (C.C.D. Kan. 1892), *aff'd*, 58 Fed. 58 (8th Cir. 1893), *rev'd*, 166 U.S. 290 (1897).
⁴ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

ment to impose legal barriers on entry into the industry, but that is not always possible. The tendency of competition to erode cartels does not, however, disprove the value of the rule against price-fixing. Though its life is limited, the cartel may last long enough to cause a substantial loss in output.

The per se rule fashioned by the Supreme Court is thus a model antitrust law. It is at once a relatively clear, workable rule and the expression of sound social policy.

In dismal contrast has been the record of the courts in the field of mergers and of practices that are thought to injure competition by injuring competitors. Such practices as exclusive dealing and price discrimination fall within this latter category. It is here that antitrust has gone awry and that the immediate cause of its crisis lies. In order to understand the crisis, it is essential to understand the doctrines that underlie the courts' performance. These consist primarily of the theories of: (1) monopoly-gaining or exclusionary practices; (2) incipency; and (3) the "social" purposes of the antitrust law. Though they enjoy nearly universal acceptance and provide the impetus and intellectual support for the law's current growth, these doctrines in their present form are inadequate theoretically and seriously disruptive when applied to practical business relationships.

QUESTIONABLE DOCTRINES OF ANTITRUST

A. Exclusionary Practices

Economic theory indicates that present notions of the exclusionary practices are fallacious. This was first perceived by Professor Aaron Director, of the University of Chicago Law School,⁵ who noted that practices conventionally labeled "exclusionary"—notably, price discrimination, vertical mergers, exclusive dealing contracts, and the like—appeared to be either competitive tactics equally available to all firms or means of maximizing the returns from a market position already held.⁶ Director's analysis indicates that, absent special factors that have not been shown to exist, so-called exclusionary practices are not means of injuring the competitive process. The example of requirements contracts illustrates the point. The theory of exclusionary tactics underlying the law appears to be that firm X, which already has ten percent of the market, can sign up more than ten percent of the retailers, perhaps twenty percent, and, by thus "foreclosing" rivals from retail outlets, obtain a larger share of the market. But one must then ask why so many retailers are willing to limit themselves to selling X's product. Why do not ninety percent of them turn to X's rivals? Because X has greater market

5. The authors are indebted to Professor Director by whom they were introduced to the general economic approach to antitrust problems represented in this article. He, of course, bears no responsibility for the specific analysis here.

6. See Director & Levi, *Low and the Future: Trade Regulation*, 51 Nw. U. L. Rev. 281 (1956).

acceptance? But if the requirements of some extra induce a price cut, and su

The theory of requirements contracts, theoretically plausible, would mean that a competitor could sign retailers to act as though X could cost any rival two a mechanism exists usual examples of conceivable.

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Professor Director's exclusionary or not that the notion of is, for such a wide anybody ever seen use of requirements begin to suspect that it has operated. The few suppose to achieve monopoly of the old Standard Court's 1911 *Standard* to have launched dissolution that chance is that it is theory of exclusion much of the im

7. Standard Oil Co. v. *United States*, 38 Stat. 73, 15 U.S.C. §§ 13, 2

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acceptance? But then X's share of the market would grow for that reason and the requirements contracts have nothing to do with it. Because X offers them some extra inducement? But that sounds like competition. It is equivalent to a price cut, and surely X's competitors can be relied upon to meet competition.

The theory of exclusionary practices, here exemplified in the use of requirements contracts, is in need of one of two additional assumptions to be theoretically plausible. One is the assumption that there are practices by which a competitor can impose greater costs upon his rivals than upon himself. That would mean that X could somehow make it more expensive for his rivals to sign retailers to requirements contracts than it is for X to do so. It would be as though X could offer a retailer a one dollar price reduction and it would cost any rival two dollars to match the offer. It is difficult to imagine that such a mechanism exists in the case of requirements contracts, price cutting, or the usual examples of predatory or exclusionary practices, but it is perhaps conceivable.

The other assumption upon which the theory of exclusionary practices might rest is that there are imperfections in or difficulties of access to the capital market that enable X to offer a one dollar inducement (it has a bankroll) and prevent its rivals from responding (they have no bankroll and, though the offering of the inducement is a responsible business tactic, for some reason cannot borrow the money). But it has yet to be demonstrated that imperfections of this type exist in the capital market.

Professor Director's reasoning applies to all practices thought to be exclusionary or monopoly gaining. A moment's thought indicates, moreover, that the notion of exclusionary practices is not merely theoretically weak but is, for such a widely accepted idea, remarkably lacking in factual support. Has anybody ever seen a firm gain a monopoly or anything like one through the use of requirements contracts? Or through price discrimination? One may begin to suspect that antitrust is less a science than an elaborate mythology, that it has operated for years on hearsay and legends rather than on reality. The few supposedly verified cases of the successful use of exclusionary tactics to achieve monopoly are primarily in the early history of antitrust. The story of the old Standard Oil trust is probably the classic example. The Supreme Court's 1911 *Standard Oil* opinion⁷ is pivotal not merely because it is thought to have launched the famous "rule of reason," nor because it decreed a dissolution that made the oil industry more competitive. Its greatest significance is that it gave substance and seeming historical veracity to the whole theory of exclusionary and monopoly-gaining techniques. It thus provided much of the impetus for the passage of the Clayton⁸ and Federal Trade

7. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

8. 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1959), as amended, 15 U.S.C. §§ 13, 21 (Supp. V, 1964).

Commission⁹ Acts in 1914. Such intellectual support as can be mustered for the law against price discrimination derives from the lessons supposedly taught by that case.

The factual accuracy of the *Standard Oil* legend is under attack and is coming to seem as dubious as the theory that it is thought to support. Professor John McGee has reviewed the entire case record of the *Standard Oil* litigation and reported that there is not one clear episode of the successful use by Standard Oil of local price cutting or other predatory practices.¹⁰ The other supposed instances of monopolies gained through such tactics deserve similar investigation.

It would be claiming too much to assert that there is no merit to the theory of exclusionary practices, but it is fair to say that that theory has been seriously challenged at both the theoretical and the empirical levels. Perhaps a sound theoretical base can be constructed. The law could then be directed at those practices that in particular settings may be exclusionary. So far as is known, however, this task has not been undertaken or even recognized by the Antitrust Division, the Federal Trade Commission, or any court.

B. Incipency

The incipency theory starts from the idea that it is possible to nip restraints of trade and monopolies in the bud before they blossom to Sherman Act proportions. It underlies the Clayton Act, the Robinson-Patman Act,¹¹ and the Federal Trade Commission Act. Though the idea initially sounds plausible, its consequences have proved calamitous. The courts have used the incipency notion as a license for almost unlimited extrapolation, reasoning from any trend toward concentration in an industry that there is an incipient lessening of competition. The difficulty with stopping a trend toward a more concentrated condition at a very early stage is that the existence of the trend is *prima facie* evidence that greater concentration is socially desirable. The trend indicates that there are emerging efficiencies or economies of scale—whether due to engineering and production developments or to new control and management techniques—which make larger size more efficient. This increased efficiency is valuable to society at large, for it means that fewer of our available resources are being used to accomplish the same amount of production and distribution. By inducing courts to strike at such trends in their very earliest stages, the concept of incipency prevents the realization of those very efficiencies that competition is supposed to encourage. But it is when the incipency concept works in tandem with the unsophisticated, but

9. 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-51 (1959), as amended, 15 U.S.C. §§ 41, 45 (Supp. V, 1964).

10. See McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & Economics 137 (1958).

11. 49 Stat. 1526 (1936), as amended, 15 U.S.C. §§ 13, 21(a) (Supp. V, 1964).

currently ascendant, the anticompetitive. When means to distinguish those that are normal effort to discern an inc evidence that a competitive injury upon competitors to injure the competitor has been "this is precisely the competition or tender case the FTC, for example with the testimony of aggressiveness may of "injury" is then prohibited seems never to occur to

C. Social Purpose and

When the anti-competitive third theory—the so-called provide a rationalization the most famous experiment passing the Sherman motives alone. "[I]t is prefer a system of sn own skill and character accept the direction of of these statutes it has was to perpetuate and an organization of industry each other."¹²

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12. United States v.

13. *Id.* at 427.

14. *Id.* at 429.

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currently ascendant, theory of exclusionary practices that its results are most anticompetitive. Where a court or the Federal Trade Commission lacks the means to distinguish between tactics that impose greater costs on rivals and those that are normal means of competing, what evidence can it look to in its effort to discern an incipient lessening of competition? The obvious resort is to evidence that a competitor has been injured, for it is through the infliction of injury upon competitors that the exclusionary devices are thought ultimately to injure the competitive process itself. There seems no way to tell that a competitor has been "injured," however, except that he has lost business. And this is precisely the meaning that the statutory test of incipient lessening of competition or tendency toward monopoly is coming to have. In case after case the FTC, for example, nails down its finding that competition is injured with the testimony of competitors of the defendant that his activities and aggressiveness may or have cost them sales. The conduct that threatens such "injury" is then prohibited. That this result is itself profoundly anticompetitive seems never to occur to the Commission or to most courts.

C. Social Purpose and Antitrust Law

When the anti-efficiency impact of the law is occasionally perceived, the third theory—the social purpose of the antitrust laws—is called upon to provide a rationalization. Judge Learned Hand's opinion in *Alcoa*¹² contains the most famous exposition of this view. Hand suggested that Congress, in passing the Sherman Act, had not necessarily been actuated by economic motives alone. "[I]t is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."¹³ He went on to say: "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."¹⁴

Hand's rhetoric has commended itself to most commentators on the topic, but it seems clear upon reflection that it is a position which is questionable as a description of congressional intent, dubious as social policy, and impossible as antitrust doctrine. It is simply not accurate to say that Congress ever squarely decided to prefer the preservation of small business to the preservation of a free market in which the forces of competition were dominant. There was much oratory in Congress about the virtues of small business but no clear indication that antitrust should create shelters for the inefficient. Moreover,

12. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

13. *Id.* at 427.

14. *Id.* at 429.

the statutory language of all the major antitrust laws after the Sherman Act explicitly requires the preservation of *competition*.¹⁵ That places an enormous burden of persuasion upon those who purport to find in the legislative history a direction to value small business above competition.

Hand's notion, moreover, is dubious, and indeed radical, social policy. It would be hard to demonstrate that the independent druggist or groceryman is any more solid and virtuous a citizen than the local manager of a chain operation. The notion that such persons are entitled to special consideration by the state is an ugly demand for class privilege. It hardly seems suited to the United States, whose dominant ideal, though doubtless too often flouted in legislative practice, has been that each business should survive only by serving consumers as they want to be served. If that ideal is to be departed from here, if antitrust is to turn from its role as the maintainer of free markets to become the industrial and commercial equivalent of the farm price-support program, then we are entitled to an unequivocal policy choice by Congress and not to vague philosophizing by courts that lack the qualifications and the mandate to behave as philosopher kings.

It is clear, in addition, that the "social purpose" concept is impossible as antitrust doctrine. It runs into head-on conflict with the per se rules against cartel agreements. Those rules leave it entirely to the play of competitive forces to determine which competitors shall grow and which shall shrink and disappear. If the social-policy argument makes sense, then we had better drop the per se rule in favor of one permitting the defense that cartels benefit small businessmen. Coexistence of the social-policy argument with the pro-competitive rules would introduce so vague a factor that prediction of the courts' behavior would become little more than a guessing game. How could one know in a particular case whether the court would apply a rigorously pro-competitive rule or the social policy of preserving small business units from aggressive behavior? When the person whose conduct is to be judged is in doubt concerning which of two completely contradictory policies will be applied, the system hardly deserves the name of law.

D. *Application of the Doctrines to Mergers*

The three theories discussed are active in many areas of antitrust, but perhaps they may be best illustrated in the law that is now developing under the provisions governing mergers. Collaboration of the theories produced the crash of antitrust merger policy in Chief Justice Warren's opinion for the Supreme Court in *Brown Shoe Co. v. United States*.¹⁶ The Court there held illegal the merger of Brown, primarily a shoe manufacturer, with the G. R. Kinney Co., primarily a retailer. Their respective shares of the nation's shoe

15. See, e.g., Clayton Act §§ 2, 3, 7, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 14, 18 (1959), as amended, 15 U.S.C. § 13 (Supp. V, 1964).
16. 370 U.S. 294 (1962).

output were four per cent of total national retail (Brown), and together outlets. With over 800 competition as is possible participating in the case find a threat to competition.

The Court held the aspects. The Court's exclusionary practice, on the manufacturing level will so "foreclose" a share of the market to other manufacturers. In *Brown Shoe Co. v. United States* was not enough by itself when two other factors were taken into consideration in the shoe industry shoes upon its retail sales which that conclusion in the fact that a number of district courts found that operated twenty-one per cent for the moment, it is in extrapolation, there would be to integrate to the same is conceivable. In fact, there would be room for more. The category of census of their income from selling outlets that actually sell clothing stores. Even if integration took place hundreds of shoe manufacturers no basis for imagining outlets any time he chooses "was thus impossible."

Brown's "avowed subsidiaries" turns out, upon the testimony of its president, to get distribution in a retail store moved into stores in his area to add new lines, "it would

17. *Id.* at 334.

output were four percent and one-half of one percent. Kinney had 1.2 percent of total national retail shoe sales by dollar volume (no figure was given for Brown), and together the companies had 2.3 percent of total retail shoe outlets. With over 800 shoe manufacturers, the industry was as close to pure competition as is possible outside a classroom model. Yet the seven Justices participating in the case purported—by application of the three theories—to find a threat to competition at both the manufacturing and the retailing levels.

The Court held the merger illegal in both its vertical and its horizontal aspects. The Court generally views vertical integration as a form of exclusionary practice, on the ground that it is always possible that the manufacturing level will sell to the retail level of the same firm and thereby "foreclose" a share of the retail market otherwise open to competing manufacturers. In *Brown Shoe*, the Court said the share of the market foreclosed was not enough by itself to make the merger illegal, but that it became illegal when two other factors were examined: "[T]he trend toward vertical integration in the shoe industry, [and] . . . Brown's avowed policy of forcing its own shoes upon its retail subsidiaries."¹⁷ It is instructive to examine the facts upon which that conclusion rests. The "trend toward vertical integration" was seen in the fact that a number of manufacturers had acquired retailing chains. The district court found that the thirteen largest shoe manufacturers, for example, operated twenty-one percent of the census shoe stores. Accepting that figure for the moment, it is impossible to see any harm to competition. On a straight extrapolation, there would be room for over sixty manufacturers of equal size to integrate to the same extent, and that would result in as pure competition as is conceivable. In fact, since these were the largest shoe manufacturers, there would be room for many more manufacturers. But that is by no means all. The category of census shoe stores includes only those that make at least half their income from selling shoes. It thus leaves out about two-thirds of the outlets that actually sell shoes, including such key ones as department and clothing stores. Even if, as there was no reason to expect, complete vertical integration took place in the industry, there would obviously be room for hundreds of shoe manufacturers and, given the ease of entry into shoe retailing, no basis for imagining that any new manufacturer could not find or create outlets any time he chose. The Court's cited "trend toward vertical integration" was thus impossible to visualize as a threat to competition.

Brown's "avowed policy of forcing its own shoes upon its retail subsidiaries" turns out, upon inspection of the Court's footnotes, to spring from the testimony of its president that Brown's motive in making the deal was to get distribution in a range of prices it was not covering, and also, as Kinney moved into stores in higher income neighborhoods and needed to upgrade and add new lines, "it would give us an opportunity . . . to be able to sell them in

17. *Id.* at 334.

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that category."¹⁸ The empirical evidence of coercion was no more impressive than this "avowal." At the time of the merger, Kinney bought no shoes from Brown, but two years later Brown was supplying 7.9 percent of Kinney's needs. (Brown's sales to its other outlets apparently had risen no higher than thirty-three percent of requirements, except in one case in which Brown supplied over fifty percent.) The "trend toward vertical integration" and the "avowed policy of forcing its own shoes upon its retail subsidiaries" were thus almost entirely imaginary. But even if they were accepted at face value, it ought to be noted that, since Kinney supplied about twenty percent of its own retail requirements, less than one percent of the nation's total retail shoe sales was open to "foreclosure" by Brown through this merger and it had actually "foreclosed" slightly less than one-tenth of one percent. The idea of vertical integration as an exclusionary device had to be coupled with almost unlimited extrapolation in the name of incipency to reach the incredible result that the Court achieved on the vertical aspect of the case.

The horizontal aspect—the putting together of Brown's and Kinney's retail outlets—was held illegal on similar reasoning. The Court found illegal the creation of market shares of as low as five percent of shoe retailing in any city. "If a merger achieving 5% control were now approved," it asserted, "we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered."¹⁹ On this reasoning every merger "further" oligopoly no matter how small a share of the market is taken over. To imagine that every firm would then merge up to five percent is to indulge in sheer conjecture, and in any event the result would be competition. Twenty firms in an industry is far too many for oligopolist behavior to occur. Given additional factors of the ease and rapidity of entry into shoe retailing, the Supreme Court's fear of oligopoly where the merger created five percent control is incomprehensible.

Then, apparently without realizing the inconsistency with its earlier prediction that Brown would "force" its shoes upon Kinney, the Court suggested that another anticompetitive aspect of Kinney's new ability to get Brown's shoes more cheaply would give it an advantage over other retailers. "The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers."²⁰ The merger was bad both because Brown might "force" Kinney and because Kinney wanted to be "forced." This fascinating holding creates an antitrust analogue to the crime of statutory rape.

Apparently concerned that the achievement of efficiency and low prices

18. *Id.* at 304 n.8.

19. *Id.* at 343-44.

20. *Id.* at 344.

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21. *Ibid.*

22. *United States v.*
F2d 509 (3d Cir. 1963).

23. *Id.* at 554.

through merger seemed to be illegal under this formulation, the Court then stated:

Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.²¹

No matter how many times you read it, that passage states: Although mergers are not rendered unlawful by the mere fact that small independent stores may be adversely affected, we must recognize that mergers are unlawful when small independent stores may be adversely affected.

The *Brown Shoe* case employed the theory of exclusionary practices to outlaw vertical integration that promised lower prices, the theory of incipency to foresee danger in a presumably desirable trend that was barely started, and the theory of "social purpose" to justify the fact that the decision prevented the realization of efficiencies by a merger which, realistically viewed, did not even remotely threaten competition.

The FTC and some of the lower federal courts are now pushing these doctrines to their logical conclusion—an attack on efficiency itself as anticompetitive. This is seen most clearly in the rash of suits challenging conglomerate mergers. A conglomerate merger is one between parties that are neither competitors nor related as supplier and customer, an example being the acquisition by a locomotive manufacturer of an underwear maker. It neither increases any firm's share of a market nor forecloses anybody from a market or source of supply. The government's attack on such mergers, therefore, has had to be on the theory that they create a "competitive advantage" which may enable the new firm to injure rivals. The competitive advantage, upon inspection, turns out to be efficiency. Thus, a district court entered a preliminary injunction at the government's request restraining Ingersoll-Rand Co. from acquiring three manufacturers of underground coal-mining machinery and equipment.²² Though the opinion rested in part upon the competing status of the acquired companies, it stressed the conglomerate aspects of the merger. One of the court's explicit fears was that the merger would create "economies of scale" (efficiencies due to size) which would put other companies at a competitive disadvantage.²³ The court of appeals affirmed, noting as anticompetitive the

21. *Ibid.*

22. *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

23. *Id.* at 554.

fact that Ingersoll-Rand would be able "to offer a complete line of equipment to its consumers and to further enhance its position and dominance in the market by extending consumer financing to prospective purchasers through its wholly owned subsidiary finance company."²⁴ This is a decision that illegality attaches when the merger enables better service to consumers.

The Federal Trade Commission expressed a similar philosophy in holding illegal Procter & Gamble's acquisition of the Clorox Chemical Co., primarily because the advantages which Clorox might derive from the union were thought likely to hurt the sales of other liquid bleach manufacturers.²⁵ The opinion met head on the obvious objection that the Commission was condemning efficiencies:

In stressing as we have the importance of advantages of scale as a factor heightening the barriers to new entry into the liquid bleach industry, and so impairing competitive conditions in that industry, we reject, as specious in law and unfounded in fact, the argument that the Commission ought not, for the sake of protecting the "inefficient" small firms in the industry, proscribe a merger so productive of "efficiencies." The short answer to this argument is that, in a proceeding under Section 7, economic efficiency or any other social benefit resulting from a merger is pertinent only insofar as it may tend to promote or retard the vigor of competition.²⁶

This passage applies not simply to advertising advantages but to all efficiency. It turns the normal order of policy around. Instead of desiring competition as a means to efficiency, the Commission here makes "the vigor of competition" an end in itself, defines it by ease of entry into the market, and expresses willingness to sacrifice societal wealth through efficiency to the maintenance of competition as so defined. The result is simply to label efficiency as anticompetitive whenever it may cause injury to competitors or make it more difficult for new firms to enter the market. All efficiency, however, is likely to have just such effects. The Commission's rationale, consistently applied, would thus favor inefficient producers at the expense of the consuming public over enormous ranges of economic activity.

Neither the *Ingersoll-Rand* case nor the *Procter & Gamble* decision considers that the creation of efficiencies is the main benefit competition has to offer society. If it now takes fewer salesmen and distribution personnel to move a product from the factory to the consumer than it used to or if advertising or promotion can be accomplished less expensively, that is a net gain to society. We are all richer to that extent. Multiplying such additions to social wealth by hundreds and thousands of transactions and an enormously important social phenomenon is perceived. And law that makes the creation of efficiency the touchstone of illegality can only tend to impoverish us as a nation.

24. *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 524 (3d Cir. 1963).

25. *Procter & Gamble Co.*, 3 TRADE REG. REP. ¶ 16673 (FTC 1963).

26. *Id.* at p. 21585.

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To inhibit the creation of efficiency in order to make life easier for other producers or for would-be entrants is to impose a tax upon efficiency for the purpose of subsidizing the inept. It is precisely analogous to a tariff designed to shield a high-cost domestic industry from more efficient foreign industry, or to a law requiring manufacturers to practice resale price maintenance in order to ease entry into retailing. The anticompetitive impact of such laws is recognized by almost all students of antitrust. It is surprising that so many of them fail to perceive the same principle in operation when the antitrust law protects competitors in the name of protecting competition.

Too few people understand that it is the essential mechanism of competition and its prime virtue that more efficient firms take business away from the less efficient. Some businesses will shrink and some will disappear. Competition is an evolutionary process. Evolution requires the extinction of some species as well as the survival of others. The business equivalents of the dodoes, the dinosaurs, and the great ground sloths are in for a bad time—and they should be. It is fortunate for all of us that there was no Federal Biological Commission around when the first small furry mammals appeared and began eating dinosaur eggs. The commission would undoubtedly have perceived a "competitive advantage," labeled it an "unfair method of evolution," and stopped the whole process right there.

In trying to understand the development of this anticompetitive strain in antitrust, it would be wrong to underestimate the role of the Supreme Court. Though compelled by neither the wording nor the legislative history of the laws, the Court has with increasing frequency taken extreme anticompetitive positions. In many cases the Court has materially changed the law as it had previously been understood. This means that the Court is making major social policy, and the policy it chooses to make today is predominantly anticompetitive. It is naive to imagine that Congress can always correct the Court when it legislates in this fashion. When the Court, consciously or uncon-
sciously, changes the meaning of a statute or the direction of a body of law, it may very well accomplish a change that Congress was politically incapable of making, but is equally incapable of reversing. In fact, the prestige of the Court is so high that by taking the lead in formulating new policy, it may make further legislative change in the same direction much easier. The propriety of this process and of the Court's rather unrestrained use of its power and influence depends of course upon one's view of the correct roles and relationships of the judiciary and the legislature. It seems at least highly doubtful that it is appropriate for major policy shifts to come through the judicial process when they could not initially have been arrived at by the political process.

Policy is thus made by the Supreme Court to a far more significant degree than by the Antitrust Division and the Federal Trade Commission. It is a policy that is also forwarded by Congress and that is, of course, acquiesced

in by the electorate. The crisis in antitrust, therefore, seems finally traceable to widespread economic misconceptions that create the opportunity for groups with political power to extract rewards from consumers that they cannot command in the market place. This gives antitrust a high political assay and greatly strengthens its protectionist bias. Scolding the enforcement agencies, while it is highly diverting sport at bar association meetings—a sort of sedentary version of bullbaiting suitable for middle-aged lawyers—is ultimately rather beside the point. Even if they wished to, they could hardly be expected to withstand the continual pressure from Congress. Basic education about the role and functioning of the market, therefore, may be the only long run hope there is for the survival of antitrust as rational social policy.

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* Professor of Law 1947; J.D., 1954.

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FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE ST. LOUIS	OFFICE OF ORIGIN BUREAU	DATE 12/14/72	INVESTIGATIVE PERIOD 12/11 - 13/72
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY: SC 	TYPED BY kmf
		CHARACTER OF CASE SPI	

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REFERENCES: Bureau teletype to WFO dated 12/11/72;
Bureau teletype to WFO dated 12/12/72;
New Haven teletype to Bureau dated 12/12/72.

- RUC -

ACCOMPLISHMENTS CLAIMED				☐ NONE	ACQUIT- TALS	CASE HAS BEEN: PENDING OVER ONE YEAR ☐ YES ☐ NO PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☐ NO
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DECEMBER 14, 1972

Office: **ST. LOUIS**

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Field Office File #:

161-NPRC-M

Bureau File #:

Title:

ROBERT HERON BORK

Character:

SPECIAL INQUIRY

Synopsis:

BORK served in the U. S. Marine Corps and Marine Corps Reserve. All service was honorable.

- RUC -

DETAILS:

[REDACTED] **ST. LOUIS, MISSOURI**

A review on December 13, 1972, of the military records maintained at the National Personnel Records Center, Military Branch, indicated **ROBERT HERON BORK**, Serial Number 571 141, enlisted in the U. S. Marine Corps Reserve on February 5, 1945, at Pittsburgh, Pennsylvania. He was ordered to and reported for active duty in the U. S. Marine Corps on May 7, 1945, at Pittsburgh, Pennsylvania. He was honorably discharged on October 27, 1946, as a private first class at San Diego, California.

He re-enlisted in the U. S. Marine Corps Reserve on April 22, 1948, at Chicago, Illinois. He served on an inactive duty status until May 3, 1949, when honorably discharged by reason of to accept a commission.

He was appointed as a second lieutenant in the U. S. Marine Corps Reserve under Serial Number 050 114 on May 4, 1949, at Chicago, Illinois. He was ordered to and reported for active duty in the U. S. Marine Corps on October 5, 1950, at Ben Avon, Pennsylvania. He was honorably relieved from active duty on March 22, 1952, as a first lieutenant at Camp Lejeune, North Carolina, and was reverted to an inactive status where he served until December 15, 1958, when honorably discharged as a captain.

SL 161-NPRC-M

He had foreign and/or sea service, exact dates and locations not shown.

His conduct and efficiency ratings ranged from "Good" to "Outstanding" and there was no record of court-martial or absence without official leave.

His date and place of birth were shown as March 1, 1927, at Pittsburgh, Pennsylvania.

FEDERAL BUREAU OF INVESTIGATION

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REPORTING OFFICE SPRINGFIELD	OFFICE OF ORIGIN BUREAU	DATE 12/14/72	INVESTIGATIVE PERIOD 12/12/72
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY SA 	TYPED BY 'slt
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ACCOMPLISHMENTS CLAIMED						☐ NONE	ACQUIT- TALS	CASE HAS BEEN:
CONVIC.	AUTO.	FUG.	FINES	SAVINGS	RECOVERIES			
								PENDING OVER ONE YEAR ☐ YES ☐ NO
								PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☐ NO

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12/14/72

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Title:

ROBERT HERON BORK

Character:

SPECIAL INQUIRY

Synopsis:

Applicant successfully passed Illinois State Bar examination and is licensed to practice in the State of Illinois but is not a member of the Illinois State Bar Association.

- RUC -

DETAILS:

MISCELLANEOUS:

On December 12, 1972, [REDACTED] Clerk, Illinois State Board of Law Examiners, Springfield, Illinois, advised that applicant passed Illinois Bar Examination in August, 1953. She further was able to verify applicant's attendance at the University of Pittsburg, July, 1944 through December, 1944, University of Chicago, January 1947 through June, 1948, and the University of Chicago Law School, September, 1948 through June, 1953. Applicant was awarded Bachelor of Arts Degree in June, 1948 and a JD Degree in June, 1953.

On December 12, 1972, [REDACTED] Clerk of Court's Office, Illinois State Supreme Court, Springfield, Illinois, advised that applicant is licensed to practice law in the State of Illinois on November 19, 1953 and her records indicated he was a member in good standing.

SI 161-617

On December 12, 1972, [REDACTED], Secretary, Illinois State Bar Association, 424 South 2nd Street, Springfield, Illinois, advised that applicant is not a member of the Illinois State Bar Association and records of that Association reflect no outstanding grievances against applicant.

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12/14/72
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COMMUNICATIONS SECTION

DEC 14 1972

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4:58 PM URGENT 12-14-72 DFH
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ROBERT HERON BORK. SPIN. BUDED: DECEMBER EIGHTEEN,
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TODAY [REDACTED], REGISTRAR'S OFFICE, UNIVERSITY OF
PITTSBURGH, PITTSBURGH, PA., ADVISED HER FILES REFLECT
ROBERT HERRON BORK, ADDRESS FIVE TWO TWO DIXON AVE., BEN AVON,
PA.; ATTENDANCE: SUMMER SEMESTER NINETEEN FORTYFOUR -
FORTYFIVE, FALL SEMESTER FORTYFOUR - FORTYFIVE. BORK'S
OVERALL AVERAGE WAS "C". HE DID NOT RECEIVE A DEGREE FROM
PITT.

TODAY [REDACTED], DESK SGT., BEN AVON BOROUGH PD, BEN
AVON, PA., ADVISED RECORDS CONTAIN NO INFORMATION IDENTIFIABLE
WITH APPOINTEE OR PARENTS.

END PAGE ONE

161-9206-14
NOT RECORDED

12 JAN 31 1973

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58 FEB 5 1973

PAGE TWO

161-982

[] ADVISED BEN AVON BOROUGH PD SHARES SAME OFFICE AS
BEN AVON HEIGHTS PD AND HE CONSULTED BOTH ARREST FILES.

TODAY THE FOLLOWING ADVISED THEIR FILES CONTAIN
NO RECORD OF APPOINTEE OR HIS PARENTS: []
IDENTIFICATION OFFICER, ALLEGHENY COUNTY DETECTIVE BUREAU,
PITTSBURGH, PA.; [], ACTING CHIEF, IDENTIFICATION
SECTION, PITTSBURGH PD. CREDIT BUREAU, INC, PITTSBURGH HAS
NO RECORD FOR APPOINTEE.

REPORT FOLLOWS.

END

~~PAGE ONE TWO~~

~~PAGE ONE PAR TWO LINE THREE SHOULD READ~~

~~DIXONAVE.,~~

~~DIXON AVE., BEN AVON,~~

GA

GWS WASH DC

ACK FOR ONE

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NR 003 RH PLAIN

5:30 PM NITEL 12-14-72 RSM

TO BUREAU

ALEXANDRIA

WFO

FROM RICHMOND (161-1329) -P-

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 14 1972

TELETYPE

Mr. Felt	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. Dalbey	_____
Mr. Gebhardt	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, E.S.	_____
Mr. Purvis	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Ms. Herwig	_____
Mr. Neenan	_____

ROBERT HERON BORK, SPI, BUDED DECEMBER EIGHTEEN NEXT, WITHOUT
FAIL.

RE NEW HAVEN TELETYPE TO BUREAU, DECEMBER THIRTEEN LAST.

FOR INFO ALEXANDRIA, WHITE HOUSE HAS REQUESTED EXPEDITE
INVESTIGATION OF BORK, WHO HAS BEEN ANNOUNCED AS BEING CONSIDERED
FOR POSITION OF DEPUTY SOLICITOR GENERAL OF THE U. S. DOB
JANUARY NINE, NINETEEN TWENTYSEVEN, PITTSBURG, PA. AND CURRENTLY
LAW PROFESSOR, YALE LAW SCHOOL.

JUSTICE DEPARTEMENT HAS REQUESTED IT BE FURNISHED COPIES OF
REPORTS OF INVESTIGATION, SUBMIT ALL RESULTS BY TELETYPE. SUBMIT
THREE COPIES OF REPORTS TO BUREAU.

END PAGE ONE

MR. LUTIN
ROOM (210)

161-9206-115

NOT RECORDED

12 JAN 31 1973

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58 FEB 5 1973

Spencer

PAGE TWO

RH 161-1329

[REDACTED] OF ECONOMICS, UNIVERSITY OF VIRGINIA (UVA), CHARLOTTESVILLE, VA., ADVISED TODAY THAT HE IS [REDACTED] OF THE THOMAS JEFFERSON CENTER AT UVA, AND IS [REDACTED] OF THE THOMAS JEFFERSON CENTER FOUNDATION. BORK IS A FAIRLY NEW MEMBER OF THE BOARD OF DIRECTORS OF THE FOUNDATION WHICH IS CONCERNED PRINCIPALLY WITH FUNDING OF THE THOMAS JEFFERSON CENTER. [REDACTED] HAS ONLY TALKED WITH BORK ON ONE OCCASION AT A MEETING OF THE FOUNDATION AT WDC. [REDACTED] STATES BORK CONSIDERED HIGHLY REPUTABLE AND WELL REGARDED IN LEGAL FIELD, AND DESPITE LIMITED CONTACT, WOULD CONSIDER HIM WELL SUITED FOR APPOINTMENT TO POSITION OF TRUST AND CONFIDENCE IN GOVERNMENT.

[REDACTED] STATES THE ONLY PERSON HE KNOWS WHO WOULD BE WELL ACQUAINTED WITH BORK IS WARREN G. NUTTER, FORMER CHAIRMAN, DEPARTMENT OF ECONOMICS, UVA, AND CURRENTLY ASSISTANT SECRETARY OF DEFENSE AT THE PENTAGON.

NO ARREST RECORD LOCATED FOR BORK WITH CHARLOTTESVILLE, VA. PD. REPORT FOLLOWS.

ALEXANDRIA WILL LOCATE AND INTERVIEW ASSISTANT SECRETARY
END PAGE TWO

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PAGE THREE

RH 161-1329

OF DEFENSE, WARREN G. NUTTER AT PENTAGON.

END

FBI VDM WASH DC

ACK FOR NR002 003

K

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 14 1972

TELETYPE

R, 001 NH PLAIN

9:15AM URGENT 12-14-72 PMR

TO: ACTING DIRECTOR
NEW YORK

FROM: NEW HAVEN (161-1518) (P) 2 PAGE

ROBERT HERON BORK, SPECIAL INQUIRY.

RE NEW HAVEN TELETYPE TO BUREAU DECEMBER TWELVE LAST,
BUREAU TELEPHONE CALL TO NEW HAVEN DECEMBER THIRTEEN SEVENTYTWO
AND CHICAGO NITEL TO BUREAU DECEMBER THIRTEEN LAST.

PER BUREAU INSTRUCTIONS CONTAINED IN RE TELEPHONE CALL,
NEW HAVEN HAS BEEN REQUESTED TO SUBMIT COMPLETE BIBLIOGRAPHY
OF APPOINTEE'S WRITINGS AS OBTAINED AT YALE UNIVERSITY AND
TO SUBMIT A REPRESENTATIVE SAMPLING OF HIS WRITINGS IN THEIR
ENTIRETY BY AIRTEL.

NOTHING NEW YORK LEAD CONTAINED IN RE CHICAGO NITEL AT
FORTUNE MAGAZINE, THE FOLLOWING ARTICLES ARE CONTAINED IN
BIBLIOGRAPHY:

"THE CRISIS IN ANTITRUST", FORTUNE, DECEMBER, NINETEEN
SIXTYTHREE.

"ANTITRUST IN DUBIOUS BATTLE", FORTUNE, SEPTEMBER,
END OF PAGE ONE

Mr. Tolson	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. Dalbey	_____
Mr. Gebhardt	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, E.S.	_____
Mr. Purvis	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Ms. Fiering	_____
Mrs. Neenan	_____

MR. JAMES
ROOM 1246

NOT RECORDED

12 JAN 31 1973

Spec. Inv.

137
58 FEB 5 1973

PAGE TWO NEW HAVEN (161-1518)

NINETEEN SIXTYNINE.

" WE SUDDENLY FEEL THAT LAW IS VULNERABLE", FORTUNE,
DECEMBER, NINETEEN SEVENTYONE.

NEW YORK OBTAIN COPIES OF TWO OF THE ABOVE AND SUBMIT
TO BUREAU BY AIRTEL.

NEW HAVEN INVESTIGATION CONTINUING. REPORT FOLLOWS.

END

LXS FBI WASH DC CLR

L

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 14 1972

TELETYPE

Mr. Felt	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. Dalbey	_____
Mr. Gebhardt	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, E.S.	_____
Mr. Purvis	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Ms. Herwig	_____
Mrs. Neenan	_____

NR006 NH CODE

5:20PM URGENT 12/14/72 VEM

TO: ACTING DIRECTOR

FROM: NEW HAVEN (161-1518) (P) 11PAGES

ROBERT HERON BORK, BUDED DEC. EIGHTEEN NEXT.

RE: BUREAU TELETYPE DEC. ELEVEN LAST.

EMPLOYMENT

ON DEC. FOURTEEN INSTANT, KINGMAN BREWSTER, JR.,
PRESIDENT OF YALE UNIVERSITY, ADVISED THAT HE HAS KNOWN THE
APPOINTEE FOR A NUMBER OF YEARS AND DESCRIBED HIM AS A
VALUED MEMBER OF YALE'S FACULTY. REGARDING
BORK'S CHARACTER, BREWSTER STATED HE WAS HONEST, COURAGEOUS,
AND HIGHLY INTELLIGENT. BREWSTER STATED FURTHER THAT BORK
IS WELL KNOWN IN THE YALE COMMUNITY FOR HIS SCHOLARLY APPROACH,
THE DEPTH OF HIS RESEARCH, AND HIS TACTFULNESS AND GENTLE
MANNER. BREWSTER ADVISED THAT HE KNEW OF NOTHING WHICH MIGHT
DISQUALIFY THE APPOINTEE FOR GOVERNMENT EMPLOYMENT OR WHICH
END PAGE ONE

NOT RECORDED

JAN 31 1973

Spec. Inv.

24

58 FEB 5 1973

NH(161-1518)

PAGE TWO

WOULD REFLECT UNFAVORABLY UPON HIS CHARACTER OR REPUTATION.

HE GLADLY GAVE BORK HIS HIGHEST ENDORSEMENT.

NEIGHBORHOOD

ON DEC. THIRTEEN LAST, THE FOLLOWING INDIVIDUALS
WERE CONTACTED AT THEIR RESIDENCES AND WITHOUT EXCEPTION ADVISED
THAT THEY WERE FAMILIAR WITH ROBERT BORK, HIS WIFE CLAIRE, [REDACTED]

[REDACTED] ALL

INDICATED THAT THE BORKS WERE GOOD NEIGHBORS, FINE FRIENDS,
AND REPUTABLE PEOPLE. NONE OF THOSE INTERVIEWED COULD FURNISH
ANY INFORMATION OF AN UNFAVORABLE NATURE REGARDING THE APPOINTEE,
HIS FAMILY OR HIS HOME LIFE AND ALL RECOMMENDED HIME FOR GOVERNMENT ~~WORK~~
~~EMPLOYMENT~~ EMPLOYMENT.

SIXTY-ONE HUNTINGTON STREET

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[REDACTED]
ONE HUNDRED FORTY-TWO HUNTINGTON

[REDACTED]
END OF PAGE TWO

NH(161-1518)

PAGE THREE

[REDACTED]

ASSOCIATES

X ON DEC. THIRTEEN LAST, [REDACTED]

[REDACTED], NEW HAVEN, CONN., ADVISED THAT HE HAS KNOWN THE APPOINTEE FOR FOUR OR FIVE YEARS AS A PROFESSIONAL ASSOCIATE AND SOCIAL ACQUAINTANCE. [REDACTED] DESCRIBED BORK AS "ONE OF THE TEN MOST COMPETENT LAWYERS IN THE U.S. " HE STATED HE BELIEVES BORK IS EXTREMELY ABLE AS A RESEARCHER, AS A PRACTITIONER, AND AS AN INSTRUCTOR. HE STATED THAT BORK IS A VERY DEEP MAN WITH FIRM CONVICTIONS. HE ADVISED THAT BORK IS A HARD WORKER AND A PRACTICAL MAN WHO CAN PUT THEORY TO WORK. [REDACTED] ADVISED THAT HE HAS BEEN IN COURT WITH BORK ON SEVERAL OCCASIONS AND FOUND HIM TO BE VERY QUICK AND ALWAYS WELL PREPARED.

[REDACTED] STATED THAT HE AND BORK HAVE OCCASIONALLY DIFFERED ON THEIR POLITICAL VIEWS. [REDACTED] DESCRIBED HIMSELF AS A "LIBERAL" AND INDICATED BY THIS HE MEANT THAT HE WAS A SUPPORTER OF JOHN KENNEDY AND MANY OF THE PROGRAMS ASSOCIATED

END PAGE THREE

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NH(161-1518)

PAGE FOUR

WITH THAT ADMINISTRATION. HE ADVISED THAT HE HAS HEARD THE TERM "CONSERVATIVE" USED TO DESCRIBE BORK, HOWEVER, HE FEELS THAT AS ALWAYS WITH SUCH TERMS IT DOES NOT BEGIN TO ACTUALLY DESCRIBE THE DEPTH OF THE MAN'S POLITICAL CONVICTIONS. [REDACTED] ELABORATED BY STATING THAT BORK IS A MAN DEEPLY CONCERNED WITH THE RIGHT OF THE INDIVIDUAL PERSON. BORK HAS GREAT INSIGHT INTO THE LAW AND IS CONCERNED OVER THE FUTURE OF THE COURTS. BORK BELIEVES IN LESS GOVERNMENT CONTROL IN THE BUSINESS AREA, HOWEVER, HIS FEELING FOR LESS REGULATION IS ONE OF DEGREE. AS A MAN EXTREMELY SENSITIVE TO THE RIGHTS OF THE INDIVIDUAL, [REDACTED] FEELS BORK WOULD BE A STRONG SUPPORTER IN THE AREA OF CIVIL RIGHTS. HE STATED THAT HE BELIEVES BORK IS A TRUE OLD FASHIONED CONSERVATIVE IN THAT BORK DOES NOT BELIEVE IN GOVERNMENT INTERFERENCE IN CORPORATE OR INDIVIDUAL RIGHTS. BORK HAS EXPANDED HIS THEORIES INTO DEVELOPING NEW INSIGHT INTO CONSERVATIVE ECONOMIC THEORY. [REDACTED] ALSO STATED THAT BORK HAS TAKEN A STAND THAT SOME ANTI-TRUST INVESTIGATIONS AND LITIGATION HAS BEEN MISGUIDED AND MISDIRECTED. BORK FEELS THAT JUST BECAUSE A CORPORATION IS LARGE IT SHOULD NOT BE SUBJECT TO ATTACK BY THE GOVERNMENT AND THAT THE GREATNESS

END PAGE FOUR

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PAGE FIVE NH 161-1518

AND SUCCESS OF A BUSINESS SHOULD NOT BE A CRITERIA FOR GOVERNMENT INTERFERENCE. BORK BELIEVES SUCH INTERFERENCE COULD BE OF GREAT HARM TO THE U.S. ECONOMY.

ACCORDING TO [REDACTED], BORK HAS ALSO WRITTEN HIS VIEWS REGARDING THE MYTH WHICH HAS GROWN UP AROUND THE AMERICAN COURT SYSTEM, THAT THE COURTS CAN SOLVE ALL PEOPLES'S PROBLEMS AND THAT THE JUDGES ARE OMNISCIENT AND OMNIPOTENT. THIS POSITION HAS RECEIVED GREAT SUPPORT LOCALLY AND NATIONALLY FROM MEMBERS OF THE JUDICIARY. [REDACTED] STATED THAT HE IS FAMILIAR WITH BORK'S WIFE AND FAMILY AND ADVISED THAT THE APPOINTEE LEADS AN EXEMPLARY FAMILY LIFE. HE ADVISED FURTHER THAT BORK IS AN OUTGOING AND PLEASANT MAN WHO ENJOYS LIFE, STATING THAT HE FEELS IT IS "UNUSUAL TO FIND A FELLOW WHO IS A TRUE GENTLEMAN, A PLEASURE TO BE WITH, AND A SUPERBLY COMPETENT LAWYER." [REDACTED] ADDED THAT THERE IS NO QUESTION THAT BORK WOULD BE AN EXTREMELY WEALTHY MAN IF HE HAD STAYED IN PRIVATE PRACTICE. HE ADVISED THAT BORK HAS A FINE DISCIPLINED MIND AND THAT HE WOULD BE A GREAT ASSET TO THE FEDERAL GOVERNMENT.

[REDACTED] KNEW OF NOTHING DEROGATORY REGARDING BORK'S
END PAGE FIVE

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PAGE SIX NH 161-1518

LOYALTY AND GLADLY GAVE HIM HIS HIGHEST RECOMMENDATION.

CREDIT AND ARREST

ON DEC. THIRTEEN LAST, [REDACTED], NEW HAVEN, CONN., CREDIT BUREAU, ADVISED THAT A REVIEW OF THE CREDIT RECORDS FOR THE APPOINTEE CONTAINED NOTHING OF ADVERSE NATURE AND THAT NO DEBTS WERE OUTSTANDING.

ON DEC. THIRTEEN LAST, PATROLMAN [REDACTED], NEW HAVEN, CONN., P.D., ADVISED THAT HE COULD LOCATE NO RECORD IDENTIFIABLE WITH EITHER THE APPOINTEE, HIS WIFE, HIS CHILDREN, OR HIS PARENTS, NOW LIVING IN NEW HAVEN.

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MISCELLANEOUS

THE FOLLOWING INDIVIDUALS WERE INTERVIEWED ON DEC. THIRTEEN LAST, REGARDING THE APPOINTEE BY SPECIAL AGENT [REDACTED]

[REDACTED]:

[REDACTED], HARTFORD, CONN., ADVISED THAT ALTHOUGH HE HAS NEVER MET THE APPOINTEE, HE IS KNOWN TO HIM BY REPUTATION AS HAVING A FINE LEGAL MIND, BEING AN EFFICIENT SCHOLAR AND A REPUTABLE MAN. HE WOULD NOT HESITATE TO RECOMMEND HIM FOR GOVERNMENT EMPLOYMENT.

END PAGE SIX

PAGE SEVEN 161-1518

[REDACTED], NEW HAVEN, CONN.,
ADVISED AS ABOVE.

[REDACTED], HARTFORD, CONN.,
ALSO ADVISED THAT THE APPOINTEE IS UNKNOWN TO HIM, HOWEVER,
HE WAS FAMILIAR WITH HIS REPUTATION IN CONNECTION WITH
RECENT EFFORTS TO RE-DISTRICT THE STATE OF CONN. [REDACTED] KNEW
ON NO REASON WHY BORK SHOULD NOT RECEIVE GOVERNMENT EMPLOYMENT.

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[REDACTED], NEW HAVEN, CONN.,
ADVISED AS ABOVE.

USD JUDGE M. JOSEPH BLUMENFELD, HARTFORD, CONN., ADVISED
HE HAS KNOWN THE APPOINTEE ON A PROFESSIONAL BASIS ONLY
AND FEELS HIM TO BE AN INTELLIGENT MAN. JUDGE BLUMENFELD NOTED
THAT THE APPOINTEE HAD SERVED AS A MASTER IN EFFORTS TO REAPPORTION THE
STATE OF CONN. HE ADVISED THAT THE APPOINTEE HAD DONE A WONDERFUL PIECE
OF WORK AND HE THOUGHT HIM TO BE A MAN OF GREAT INDUSTRY. HE BELIEVES
THE APPOINTEE RATED ONLY THE HIGHEST RECOMMENDATION FOR THIS POSITION.

SENIOR CIRCUIT COURT JUDGE J. JOSEPH SMITH, SECOND CIRCUIT
COURT, HARTFORD, CONN., ADVISED THAT HE KNOWS THE
END PAGE SEVEN

PAGE EIGHT NH 161-1518

APPOINTEE ON A PROFESSIONAL BASIS FROM HIS WORK IN THE REAPPORTION CASE IN CONN. HE KNOWS HIM TO BE AN ABLE ATTORNEY, THOROUGH AND INTELLIGENT. HE NOTED THAT THE APPOINTEE IS WELL THOUGHT OF IN THE THE FIELD OF CONSTITUTION LAW AND THAT HE WOULD HAVE NO QUESTION AS TO HIS CHARACTER AND LOYALTY. SMITH NOTED THAT HE FEELS THE APPOINTEE IS SO QUALIFIED THAT HE HAD PREVIOUSLY RECOMMENDED HIM FOR APPOINTMENT TO THE SECOND CURCUIT COURT OF APPEALS TO FOLLOW HIM IN HIS RETIREMENT.

USDC JUDGE JON O. NEWMAN, HARTFORD, CONN., ADVISED THAT THE APPOINTEE HAS APPEARED BEFORE HIM IN NEW HAVEN, CONN. IN AN ANTI-TRUST CASE INVOLVING THE PENN CENTRAL RAILROAD. HE FOUNE BORK TO BE A VERY KNOWLEDGEABLE PERSON, WELL VERSED IN THE LAW AND AN ABLE ATTORNEY. ALTHOUGH HE HAS HAD NO OTHER CONTACTS WITH THE APPOINTEE, HE FEELS THAT THERE IS NO QUESTION AS TO HIS CHARACTER, LOYALTY, AND GLADLY RECOMMENDED HIM.

A REVIEW OF THE FILES OF THE CONN. STATE BAR ASSOCIATION, HARTFORD, CONN., REVEALED THAT THE APPOINTEE IS NOT A MEMBER OF THIS ASSOCIATION.

[REDACTED], [REDACTED],

[REDACTED] LEADER

END PAGE EIGHT

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PAGE NINE NH 161-1518

IN THE BLACK COMMUNITY, ADVISED ON DEC. THIRTEEN LAST, THAT HE HAS ONLY INDIRECT KNOWLEDGE OF BORK WHICH IS BASED ON THE FRIENDSHIP OS [REDACTED] WHO WERE FORMER CLASSMATES AT A PRIVATE PREPARATORY SCHOOL. [REDACTED] REITERATED THAT HE HAD NO PERSONAL KNOWLEDGE OF BORK NOR DID HE POSSESS ANY INFORMATION CONCERNING HIM WHICH HE WOULD CONSIDER UNFAVORABLE.

[REDACTED], URBAN LEAGUE, NEW HAVEN, CONN., ADVISED ON DEC. THIRTEEN LAST, THAT HE IS NOT PERSONALLY ACQUAINTED WITH BORK BUT IS AWARE OF HIS STATUS AS A PROFESSOR OF LAW AT YALE UNIV. [REDACTED] RELATED THAT IN THE COURSE OF HIS CONTACTS WITH OTHER LEGAL ASSOCIATES AT YALE UNIV., NOTHING HAS EVER COME TO HIS ATTENTION CONCERNING BORK WHICH HE WOULD CONSIDER UNFAVORABLE.

[REDACTED] CIRCUIT COURT, STATE OF CONN., ADVISED ON DEC. THIRTEEN LAST, THAT HE HAS NO PERSONAL KNOWLEDGE OF BORK AND THAT TO THE BEST OF HIS RECOLLECTION, BORK HAS NEVER APPEARED IN ANY OF THE STATE'S CIRCUIT COURTS.

[REDACTED] SIXTH CIRCUIT COURT, NEW
END PAGE NINE

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NH(161-1518)

PAGE TEN

HAVEN, CONN., ADVISED ON DEC. THIRTEEN LAST, THAT HE HAS NO PERSONAL KNOWLEDGE OF BORK.

JOHN REYNOLDS AND FRANK J. KINNEY, JR., CIRCUIT COURT JEDGES, STATE OF CONN., ADVISED ON DEC. THIRTEEN LAST, THAT THEY ARE NOT PERSONALLY ACQUAINTED WITH BORK AND POSSESSED NO INFORMATION CONCERNING HIM.

PATRICK B. O'SULLIVAN, RETIRED FORMER CHIEF JUSTICE, CURRENTLY CONN. STATE REFEREE, SUPERIOR COURT, ADVISED ON DEC. THIRTEEN LAST, THAT HE IS NOT PERSONALLY ACQUAINTED WITH BORK BUT HAS HEARD OF HIM THROUGH HIS LEGAL ASSOCIATES AT YALE UNIV. HE STATED THAT FROM COMMENTS HE HAD HEARD, HE CAN ONLY CONCLUDE THAT BORK IS VERY HIGHLY REGARDED BY HIS ASSOCIATES IN THE COMMUNITY.

HERBERT S. MAC DONALD, JUDGE, SUPERIOR COURT, NEW HAVEN, CONN., ADVISED ON DEC. THIRTEEN LAST, THAT HE PERSONALLY MET BORK ABOUT THREE OR FOUR MONTHS AGO WHEN HE, MAC DONALD, WAS INVITED TO A SMALL SOCIAL GATHERING FOR THE EXPRESS PURPOSE OF MEETING BORK AND GAINING A PERSONAL ACCESSMENT OF HIM. MAC DONALD EXPLAINED THAT BORK'S NAME HAD BEEN PROPOSED FOR

END PAGE TEN

NH(161-15-18)

PAGE ELEVEN

CONSIDERATION FOR APPOINTMENT TO THE SECOND CIRCUIT COURT,
NEW YORK. MAC DONALD SAID HE WAS VERY FAVORABLY IMPRESSED
WITH BORK'S "ERUDITION". HE SAID HE HAS SINCE READ SOME OF BORK'S
WRITINGS AND HAS BEEN EQUALLY IMPRESSED AS THEY HAVE CONVEYED
TO HIM A SENSE OF OBJECTIVITY AND OPEN-MINEDNESS ON THE PART
OF BORK. MAC DONALD ADDED THAT ALTHOUGH HIS KNOWLEDGE OF BORK
WAS LIMITED BASED ON THIS ONE PERSONAL CONTACT, HE WOULD
RECOMMEND HIM FOR A POSITION WITH THE U.S. GOVERNMENT.

RE

END

RES FBI WASH CLR

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE PITTSBURGH	OFFICE OF ORIGIN BUREAU	DATE 12/15/72	INVESTIGATIVE PERIOD 12/14/72
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY [REDACTED]	TYPED BY clw
		CHARACTER OF CASE SPECIAL INQUIRY	

b6
b7CREFERENCES

ST
71
New Haven teletype to Bureau dated 12/12/72.
Pittsburgh teletype to Philadelphia dated 12/13/72.
Bureau teletype to Pittsburgh dated 12/14/72.
Pittsburgh teletype to Bureau dated 12/14/72.

- R U C -

ACCOMPLISHMENTS CLAIMED					☐ NONE	ACQUIT- TALS	CASE HAS BEEN: PENDING OVER ONE YEAR ☐ YES ☐ NO PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☐ NO
CONVIC.	FUG.	FINES	SAVINGS	RECOVERIES			
APPROVED COPIES MADE: 1 - Bureau 1 - Pittsburgh (161-982)						DO NOT WRITE IN SPACES BELOW 161-9206-18 NOT RECORDED 1 DEC 18 1972	
SPECIAL AGENT IN CHARGE							
Dissemination Record of Attached Report						Notations	
Agency	one to Deputy A.G.						
Request Recd.							
Date Fwd.	JAN 3 1973						
How Fwd.							
By	58 FEB 5 1973						

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COVER PAGE

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to:

Report of:

Office: PITTSBURGH, PA.

b6

Date:

12/15/72

b7C

Field Office File #: 161-982

Bureau File #:

Title:

ROBERT HERON BORK

Character:

SPECIAL INQUIRY

Synopsis:

Appointee's attendance at the University of Pittsburgh, Pittsburgh, Pennsylvania, verified. Arrest checks re appointee negative. No credit record for applicant.

- RUC -

PG 161-982

DETAILS:

Pittsburgh credit and arrest checks were made by
SC [redacted]; the remainder was conducted by
SA [redacted].

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PG 161-982

EDUCATION

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On December 14, 1972, [REDACTED], Registrar's Office, University of Pittsburgh, Pittsburgh, Pa., upon reviewing files, advised that ROBERT HERRON BORK attended the University during the summer and fall semesters of 1944-1945. At that time, his address was reflected as being 522 Dixon Avenue, Ben Avon, Pa. His overall average was a C. BORK did not receive a degree from the University. There was no other information reflected in her file.

PG 161-982

ARREST

On December 14, 1972, [REDACTED], Desk Sergeant, Ben Avon Borough Police Department, Ben Avon, Pa., advised that the police departments for both Ben Avon Borough and Ben Avon Heights share the same office. He reviewed records back to 1950 in both police departments and advised there was no record identifiable for appointee or his parents.

On December 14, 1972, the following individuals advised their files reflect no record identifiable with appointee or his parents:

[REDACTED], Identification Division, Pittsburgh Police Department, Pittsburgh, Pa.

[REDACTED], Identification Officer, Allegheny County Detective Bureau, Pittsburgh, Pa.

On December 14, 1972, [REDACTED], File Supervisor, Credit Bureau, Inc., Pittsburgh, Pa., advised she has no credit record for the applicant.

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FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE BALTIMORE	OFFICE OF ORIGIN BUREAU	DATE 12/15/72	INVESTIGATIVE PERIOD 12/12/72 - 12/13/72
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY SC 	TYPED BY djr
		CHARACTER OF CASE SPECIAL INQUIRY	

b6
b7CREFERENCE:

Bureau teletype to WFO, 12/11/72.
 Bureau teletype to WFO, 12/12/72.
 Baltimore telephone call to Alexandria, 12/13/72.

- RUC -

ADMINISTRATIVE DATA:

For information of the Bureau, Alexandria office notified of NIS file number for appointee by telephone on 12/13/72.

ACCOMPLISHMENTS CLAIMED					☒ NONE	ACQUIT-TALS	CASE HAS BEEN: PENDING OVER ONE YEAR ☐ YES ☒ NO PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☒ NO
CONVIC.	FUG.	FINES	SAVINGS	RECOVERIES			
APPROVED <i>[Signature]</i> COPIES MADE: ③ - Bureau 1 - Alexandria 1 - Baltimore (161-FH)						SPECIAL AGENT IN CHARGE	
						DO NOT WRITE IN SPACES BELOW	
						161-9206-19	
						NOT RECORDED	
						15 DEC 18 1972	
Dissemination Record of Attached Report						Notations <i>[Signature]</i>	
Agency	one cc Deputy A.G.						
Request Recd.							
Date Fwd.	JAN 3 1973						
How Fwd.							
By	58 FEB 5 1973						

A*
COVER PAGE

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to:

Report of:

SC [REDACTED]

Office: BALTIMORE

Date:

12/15/72

b6

b7C

Field Office File #:

161-FH

Bureau File #:

Title:

ROBERT HERON BORK

Character:

SPECIAL INQUIRY

Synopsis:

DCII reflected information concerning the appointee is located in NIS file M00452316. Review of NIS file will appear elsewhere in this investigation.

- RUC -

DETAILS:AT BALTIMORE, MARYLAND

The Defense Central Index of Investigations (DCII), Fort Holabird, Maryland, comprising indices to military investigative files was checked through a representative of that agency and reflected information concerning the appointee is located in U.S. Naval Investigative Service (NIS) file M00452316.

Review of NIS file will appear elsewhere in this investigation.

1*

F B I

Date: 12/15/72

Transmit the following in _____
(Type in plaintext or code)Via AIRTEL _____
(Priority)

TO: ACTING DIRECTOR, FBI

FROM: SAC, NEW YORK (161-4282) (P)

SUBJECT: ROBERT HERON BORK
SPECIAL INQUIRY
BUDED: 9/18/72

Re New Haven tel 12/12/72.

Enclosed are eleven copies of articles relating to
appointee which were obtained from the New York Times Morgue.

1 - Bureau (Encl. 11)
1 - New York

JTO:pml
(3)

ENCLOSURE ATTACHED

NOT RECORDED

12 DEC 18 1972

Approved: [Signature] 37
Special Agent in Charge

Sent _____ M Per _____

ROBERT HERON BORK
SPECIAL INQUIRY
BUDED: 9/18/72

Enclosed are 11 copies of
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which were obtained from NY
Times Morgue.

NY file 161-4282

NY airtel to Bureau, 12/15/72.

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161-9206-20

ENCLOSURE

Amendment Favored for Lowering Voting Age

To the Editor:

As The Times has reported, the Justice Department opposes, as unconstitutional, the pending proposal to lower the voting age in national and state elections to 18 by statute.

As constitutional lawyers—some of whom favor and some of whom oppose lowering the voting age, and none of whom counts himself a knee-jerk partisan of all Justice Department positions—we believe the Department is right on this very important constitutional issue. Our reasons are these:

1. Within broad limits, the Constitution leaves states free to set qualifications for participation in national and state elections. The limits are these: Those qualified to vote for the most numerous branch of the state legislature must be permitted to vote for Representatives and Senators.

No would-be voter can be excluded from any election on grounds of race (the 15th Amendment) or sex (the 19th Amendment). And no state can impose a poll tax in any national election (the 24th Amendment) or, in any election, prescribe a voting qualification so invidious or irrational as to be a denial of the equal pro-

tection of the laws (Section 1 of the 14th Amendment).

2. Those who believe Congress can lower the voting age by statute argue in substance that Congress can declare that the 46 states with a minimum voting age of 21 are denying younger would-be voters the equal protection of the laws.

Reliance is placed on *Katzbach v. Morgan*, where the Supreme Court sustained a Federal statute barring states from denying the vote to Americans of Puerto Rican origin literate in Spanish but not in English. *Katzbach v. Morgan* makes sense as part of the main stream of 14th Amendment litigation, policing state restrictions on ethnic minorities. But it has little apparent application to a restriction affecting all young Americans in 46 states.

3. There is a further, and to us conclusive, reason why *Katzbach v. Morgan* is unavailing: The long-ignored Section 2 of the 14th Amendment explicitly recognizes the age of 21 as a presumptive benchmark for entry into the franchise. It surpasses belief that the Constitution authorizes Congress to define the 14th Amendment's equal-protection clause so as to outlaw what the Amendment's next section approves.

A statute lowering the voting age would raise the expectations of ten million young Americans—expectations likely to be dashed by a judicial determination that the statute is unconstitutional. This lends point to the fact that when heretofore the nation decided upon a fundamental change in the composition of the electorate, the consensus was embodied in permanent and unchallengeable form, in a constitutional amendment: One hundred years ago the 15th Amendment, enfranchising blacks, was added to the Constitution.

Fifty years ago the 19th Amendment, enfranchising women, was added to the Constitution. If, in 1970, the nation is ready to welcome into the political process Americans who have reached the age of 18, Congress should, in fidelity to our constitutional traditions, submit to the states for ratification a new constitutional amendment embodying that new consensus.

ALEXANDER M. BICSEL, CHARLES L. BLACK JR., ROBERT H. BORK, JOHN HART ELY, LOUIS H. POLLAK, EUGENE V. ROSTOW
New Haven, April 1, 1970

The writers are members of the faculty at Yale Law School.

573 004

THE NEW YORK TIMES

Hartford Will Try to Redraw State Districts Today

By LAWRENCE FELLOWS
Special to The New York Times

HARTFORD, May 1—The Connecticut General Assembly will meet tomorrow—the day before it is required by the State Constitution to adjourn—in a final effort to agree on a reapportionment plan and permit election processes and political life in the state to get back on their normal, hectic, election-year course.

"We're not giving up on anything," John M. Bailey, state Democratic chairman, said last week as he walked out of one closed meeting of legislative leaders and headed for another.

So far, neither the party leaders nor the eight-member legislative commission specifically charged with the task has come up with an agreed-upon reapportionment plan, partly because the state legislators are reluctant to cut back their own numbers, and partly because they accuse one another of trying to pull and stretch the outlines of the districts to make the most of the votes there.

Even if the General Assembly arrives at a plan, it will still need the approval of the United States District Court here—the court that threw out the existing one a month ago as unconstitutional.

If the legislators fail to work out a plan that is accepted as constitutional, Connecticut may have to wait another month before it learns how its political districts are to be sliced, and how many are to disappear.

"I am about in the stream now," Prof. Robert Bork of Yale Law School said at his home

in New Haven yesterday. The 43-year-old professor of constitutional law was appointed by the court to draft a new reapportionment plan for the General Assembly.

The reapportionment plan that the Federal Court disapproved as unconstitutional had reduced the number of districts for the State House of Representatives from 177 to 151. The number of Senate districts was left at 36, but the lines were changed drastically.

The method used resulted in creating some districts with "highly irregular and bizarre outlines," the court ruled.

"We conclude that the deviations from equality of population of the Senate and House districts are not justified by any state interest and that the plan denies equal protection of the law to voters in the districts of greater population," the court added.

As a result of the court decision, registrars in the 169 cities and towns in Connecticut had to quit working on the voters' lists in the newly redrawn districts.

The endorsement of candidates for the State Senate and House of Representatives was to have been done between

April 13 and 27, and had to be postponed.

Without voting districts, there can be no nominating procedures and no party primaries.

The State Constitution provides that the General Assembly gets first crack at reapportionment after each census.

If the legislature fails, then an eight-member bipartisan commission gets the task.

If the commission fails, the job goes to a panel of three state judges, as happened with the reapportionment plan that was thrown out last month as unconstitutional.

I'm Sandy
Fly my sp

'annot Conceive' Supreme Court Will Uphold Plan

By FRED P. GRAHAM
Special to The New York Times

WASHINGTON, March 17—Chief Justice Warren, Supreme Court Justice Thurgood Marshall and Justice William J. Brennan today called President Nixon's proposed anti-busing legislation "a proposal to restore the separate but equal concept" and said they "cannot conceive" that the Supreme Court would uphold it. Interviewed in his law office here, the former Justice, who said that he was breaking a self-imposed ban against speaking out on any proposed legislation, expressed the view that Mr. Nixon's proposed moratorium on busing orders would be plainly unconstitutional. A check of other constitutional law experts indicated that they also had substantial doubts as to the constitutionality of Mr. Nixon's moratorium proposal. However, these experts felt that under certain liberal interpretations by the Warren Court enlarging the power of Congress to implement the 14th Amendment, Mr. Nixon's proposals for limiting busing might well be found to be constitutional. Anticipating that the constitutionality of Mr. Nixon's proposals would become a center of dispute, the White House flew two constitutional law professors to Washington today to brief reporters. However, when the briefing was put "on the record," the professors, Charles A. Wright of the University of Texas and Robert Bork of Yale, did not appear.

Secretary Presents Case

Ken Clawson, an assistant to Herbert Goldhamer, Mr. Nixon's director of communications, explained that Mr. Wright had flown here from New York and Mr. Bork had broken off a skiing vacation at Stone, Vt., after the White House asked them to give a background briefing to a small group of reporters specializing in legal news.

When two dozen reporters showed up, and the identities of the two professors would necessarily be disclosed, the Government decided not to ask them "to alter the understanding," Mr. Clawson said.

The result was that the Nixon Administration's arguments in favor of the proposed laws' constitutionality were presented by Elliot L. Richardson, the Secretary of Health, Education and Welfare; Wilbur R. Hastings, one of his legal assistants; and Daniel McAuliffe, an attorney in the Justice Department's Internal Security Division.

At issue are two separate proposed laws.

One, the Student Transportation Moratorium Act, would ban all new busing orders by lower Federal courts until July 1, 1973, or until Congress took action on Mr. Nixon's other busing measure, whichever came sooner.

The other is the Equal Educational Opportunities Act, which would earmark funds to upgrade inner-city schools and outlaw deliberate segregation. But busing to overcome segregation would be limited to junior high and high school, and such busing would be used

only temporarily and as a last resort.

Mr. Goldberg, who left the Supreme Court in 1967 to become Ambassador to the United Nations, said that the moratorium would violate Article III, Section 1 of the Constitution, which vests United States judicial power exclusively in Federal courts.

He said that although Congress could prescribe the ordinary remedies the courts could use, "there is no constitutional way in which the Congress can diminish the courts' power to implement the Constitution."

Mr. Goldberg said that the second bill, which places "quality" education in neighborhood schools before integration, violates the Supreme Court's 1954 school desegregation decision that declared "separate educational facilities are inherently unequal."

He said that Congress might prescribe other means than

those chosen by the Supreme Court to enforce the 14th Amendment's guarantee of equal protection of the laws only if the result were equal education, and "the Supreme Court has said separate cannot be equal."

Paul J. Mishkin of the University of Pennsylvania Law School and Gerald Gunther, a constitutional law professor at Stanford, said that there was no precise precedent for the kind of moratorium that Mr. Nixon wanted. Mr. Gunther felt that its constitutionality was shaky, because "you can't tell a court how to decide a case" which he felt Mr. Nixon was doing by ruling out busing as a remedy.

Both men stressed that the Warren court, in a 1966 decision, South Carolina v. Katzenbach, declared that Congress had extremely broad discretion to implement the 14th Amend-

ment, and that the Supreme Court would not question closely the means chosen by Congress. Under this ruling a strong argument could be made that Mr. Nixon's "neighborhood school approach to equal education should be upheld," they said.

573 004

Court Gets Connecticut Districting Plan

By LAWRENCE FELLOWS
Special to The New York Times

NEW HAVEN, May 26—A plan that would reduce the number of Connecticut legislators and redraw the lines of the constituencies has been submitted to the United States District Court here as the first step of a court-ordered effort to revive Connecticut's stalled election processes.

The plan was worked out by Prof. Robert H. Bork of the Yale Law School, an expert on legislative reapportionment. The court assigned Mr. Bork to the task on March 30, when it declared the state's reapportionment plan unconstitutional.

The Republicans, who had drawn up the plan, sought a stay of that ruling from a three-judge Federal court in Hartford. The stay was unanimously denied today. The court ruled that granting the stay would have meant permitting the unconstitutional plan to be the basis for the coming elections.

Professor Bork left the number of State Senate seats at 36, dividing each Senate district into four seats for the House of Representatives, shrinking the number of House members from 177 to 144.

The legislators have known

the general idea of Professor Bork's plan for weeks, so there were no new signs of consternation from them today, even though some of them would fall by the wayside if the plan goes through.

The Connecticut lawmakers were more worried over the fact that the plan cuts through the lines of many of the state's 169 towns. This is forbidden by the state Constitution.

In his report to the court, Mr. Bork said that he wanted to respect the town lines, but could not always divide the population evenly that way. Where he could not, he said, he assumed Federal law would override state law.

Concern for Town Lines

"It is arithmetically impossible to achieve constitutionally required population equality and also to comply with the rule against dividing towns," he said. But he added that "when it was consistent with the overriding goal of population equality, towns were preserved intact."

"No consideration whatever was given to the effect of the plans upon any political party or candidate," he said in his report.

The professor cut across 30

town lines in creating the 36 Senate districts. He crossed 60 town lines in creating the 144 House districts.

Mr. Bork said that the census map showed Connecticut's 1970 population to be 3,032,217, and that his plan would put 21,057 persons in each House district, and 84,228 persons in each Senate district.

Panel Seeks Own Plan

None of the leaders in either chamber seemed personally worried by the plan, although some members of both chambers felt that they would have to fight harder to retain their seats.

The reapportionment plan ruled unconstitutional by the court had reduced the number of House districts from 177 to 151. The number of Senate districts was left at 36, but the lines were changed in a way that the court found too drastic.

"The methods used resulted in creating some districts with highly irregular and bizarre outlines," the court ruled.

An eight-member bipartisan commission is trying to come up with an acceptable plan of its own. The court has said that it would consider this and other plans submitted by June 6 at a hearing on June 9 in Hartford Federal Court.

COURT VOIDS PLAN ON REDISTRICTING

Continued From Page 1, Col. 3

cedures, said the General Assembly might have to pass emergency legislation to delay pending nominations of candidates for the Senate and House in next November's election.

The court decision, by Judges M. Joseph Blumenfeld, J. Joseph Smith and Robert J. Zampano, gratified Democrats, stunned Republicans and continued a condition of relative crisis over reapportionment that has prevailed for a year.

'Denies Equal Protection'

The court based its decision on findings that the plan contained "unjustified deviations from equality of population" of Senate and House districts and that many districts had been drawn with "political balance" in mind.

Discussing the population deviations, the court said that the plan "denies equal protection of the law to voters in the districts of greater population, in violation of the 14th Amendment to the Constitution of the United States."

"The plan is therefore invalid, the Court said, "and its employment in elections to the Connecticut General Assembly must be enjoined."

The judges said that "the Supreme Court plainly would not approve the partisan political structuring," which was also a cause of the population deviations built into the plan.

Judges Are Appointed

After the General Assembly failed to meet an April 1, 1971, state constitutional deadline for adopting a new plan, and after an eight-member commission appointed by Gov. Thomas J. Meskill then failed to meet a July 1, 1971, deadline, three state judges were appointed to draw up a plan.

The plan, which was the subject of the decision today, left the three judges divided along political lines. Two of the framers, Republicans George Saden of Superior Court and Associate Supreme Court Justice John R. Tim, endorsed it, while Superior Court Judge Leo Parskey, a Democrat, called some of its districting lines "bizarre" and refused to subscribe to it.

The Democrats, who control both houses of the Legislature, brought the Federal Court challenge.

The reapportionment is mandated by the State Constitution every 10 years, following the Federal census. The plan was to take effect upon publication three months ago.

Assembly Redistrict Plan In Connecticut Invalidated

Special to The New York Times

HARTFORD, March 30—A Federal Court here today declared unconstitutional Connecticut's controversial plan for reapportioning the General Assembly. The ruling stunned

the state's legislative and political leaders.

The unanimous decision by a three-judge panel ordered implementation of the plan halted and said the court intended to appoint a special master to draft a new plan, although it added that it would "welcome" another effort by the General Assembly itself.

Later, the court, asserting that "time is short and delay in the hope of such legislative action is not justified," announced the appointment of a special master of Prof. Robert H. Bork of Yale Law School, an authority on constitutional law.

Francis J. McCarthy, the attorney who represented the Republican party in its losing effort to win the court's approval, said that "no decision has been made on the possibility of an appeal to the United States Supreme Court." He did not say when such a decision might be made.

In the meantime, political and legislative leaders planned to hold a bipartisan general meeting to discuss the situation on Tuesday, when the General Assembly reconvenes after a holiday recess.

Mrs. Gloria Schaffer, Secretary of the State and in charge of Connecticut's election pro-

Continued on Page 23, Column 5

CONNECTICUT WINS A REMAPPING STAY

Prof. Robert
Decision for Supreme Court
Could Cause State to Use

'71 Plan for Fall Vote

H. BORK

By RICHARD L. MADDEN

Special to The New York Times

WASHINGTON, June 12 —

The Supreme Court, dividing 7 to 2, granted a stay today of a lower court ruling that had declared unconstitutional Connecticut's plan for reapportioning the General Assembly.

The effect of the stay appeared to be that Connecticut's legislators would be elected this fall under a 1971 reapportionment plan that a three-judge Federal Court in Hartford held last March 30 to be unconstitutional.

Under that plan, the number of districts for the State House of Representatives was reduced from 177 to 151. The number of Senate Districts was left at 36, but the lines were changed drastically.

The Supreme Court stay granted today had been sought by J. Brian Gaffney, the Connecticut Republican chairman, after the three-judge court in Hartford rejected a similar application May 26 on the ground that granting the stay would have meant permitting an un-

Continued on Page 32, Column 4

573 004

THE NEW YORK TIMES, TUESDAY, JUNE 13, 1972

CONNECTICUT WINS A REMAPPING STAY

Continued From Page 1, Col. 5

constitutional plan to be in basis for the coming election.

Associate Justices Potter Stewart and William O. Douglas opposed granting the stay.

In a dissenting opinion, Mr. Douglas said, in part: "If the court below erred, the fall election will be held under an improper order, one which will doubtless affect the composition of the next state legislature. But this type of 'irresponsible injury' affects both sides equally, for if the court below was correct, staying its order will cause irreparable harm of precisely the same dimension."

He contended that Mr. Gaffney had not showed that the

lower-court decision was erroneous.

The majority opinion was issued without comment.

Gaffney Jubilant

By LAWRENCE FELLOWS

Special to The New York Times

HARTFORD, June 12 — The Supreme Court decision left the state's election officials confused and many of its politicians in dismay. Some Republicans, especially the leaders, were delighted, however.

"We won the stay," shouted Mr. Gaffney, waving to other Republicans at the State Capitol, where a special session of the legislature was just getting under way.

He had just talked to the clerk of the Supreme Court by telephone, and was jubilant, as were some other Republicans. The reapportionment plan was one produced by their party, and heavily gerrymandered in

their favor, according to the ruling of the Federal Court in Hartford.

The reapportionment plan, drawn up after the 1970 census by three state judges picked by Gov. Thomas J. Meskill's Republican administration, took some of the bias out of the House lines drawn when the Democrats controlled the administration as well as the General Assembly.

Accordingly, some of the State Representatives who are likely to be defeated if the plan is used in the November elections will be Republicans, which helps to explain the gloomy fringes in the Republican camp today.

"I think quite a few of us may be lame ducks," said House Speaker William R. Ratchford, a Democrat. He was calling the House to order today to deal with the business before it: reconsidering vetoed legislation. The number of Senate districts was left at 36 in the

reapportionment plan, and most political observers say the Republicans have a chance of regaining control of that chamber.

"The method used resulted in creating some districts with highly irregular and bizarre outlines," the three-judge panel in Hartford said.

In his plea for a stay, Mr. Gaffney had argued that the plan contained only "minuscule" deviations from the rule of equal populations in the districts.

Democrats argued persistently to the contrary, and some stated today that the Supreme Court still had not ruled on their own motion to affirm the ruling of the Hartford court, that is, striking down the plan that was revived by the stay.

The Hartford court had commissioned Prof. Robert H. Bork of Yale University to draw up a plan that would abide by the principle of equal population in the districts.

The plan Professor Bork submitted to the court on May left the number of Senate seats at 36, but divided each Senate District into four House districts, leaving 144 instead of the 151 provided for in the publican plan or the 177 in existing system.

Although Professor Bork, a Republican, his plan appealed to retain more Democratic seats than Republican ones. But in search for numerical equality he drew district lines across town lines, which are the traditional boundaries of political power in Connecticut, and no one was certain of the political division of the districts might be.

In Federal Court in New Haven, the Republicans filed a new suit today, seeking to enjoin the state from holding Congressional elections in November because no Congressional districting plan has emerged since the 1970 census.

573004

THE NEW YORK TIMES, T

Election Ordered in Connecticut Under Plan a Panel Held Illegal

Special to The New York Times

HARTFORD, Aug. 23—A state judge here today ordered a General Assembly election this November under a plan of apportionment a panel of three Federal judges had ruled unconstitutional.

Superior Court Judge Walter J. Sidor ruled that the only problems with the reapportionment plan the Federal court had rejected were "clerical errors," and he corrected them according to requests filed by lawyers for the Republicans.

James A. Wade, the Democratic counsel, immediately said the case would be appealed to the State Supreme Court, but he did not indicate what the basis of the appeal would be or when it would be filed.

The lawyers for the Republicans asked Judge Sidor to waive the normal 20-day stay of execution for appeal allowed after Superior Court decisions. Judge Sidor has scheduled a hearing for today on that request.

Judge Sidor ordered into filed last reapportionment plan filed last September by a panel consisting of Superior Court Judges George A. Saden and Leo Parskey and Supreme Court Justice John R. Thim.

Democrat Objects

Judge Parskey, the only Democrat on the panel, refused to go along with the other two, but the plan was filed over his objections. Last spring a Federal three-judge panel agreed with contentions by lawyers for the Democrats that the Saden plan gerrymandered election districts for political reasons.

The Federal Court decision was appealed to the United States Supreme Court, which issued a stay of execution barring a reapportionment plan made especially for the Federal Court.

The Saden plan that Judge Sidor ordered into effect retains the present 36 State Senate districts, while cutting the House of Representatives from 177 to 155 districts.

Judge Sidor rejected claims that the plan violated both the State and Federal Constitutions, and said of the minor errors in the plan, "it is very easy to understand how such human errors crept into the work of the state board." The Saden plan was formally drawn up by a State Board of Apportionment consisting of the three judges.

Judge Sidor characterized the plan as "the best judgmental adaptation to harmonize Federal and state constitutional precepts."

"From all the evidence available to the court," he declared, it seems clear that no election

will be held unless one can be ordered by this court."

Appended to his decision was an election calendar, which an elections attorney from the office of Secretary of the State Gloria Schaffer said could be realized despite the time delay.

The timetable orders officials to begin the electoral process by Sept. 1, with the last primary to be held on Oct. 18 if it is required. The election will be on Nov. 7.

In his 13-page decision, Judge Sidor noted that only five alternatives for a state election existed: An election under the old plan, used since 1965; no election at all; the Saden plan; a plan drawn by Yale University Professor Robert H. Bork at the order of the United States District Court, or a statewide election at large for all seats in the General Assembly.

However, Judge Sidor said a United States Supreme Court stay of execution order of June 12 eliminated the Bork plan, and that a statewide election for all the seats would probably forfeit representation for whichever party did not poll a statewide majority.

The plan under which the present Assembly was elected cannot be used because the 1970 United States Census showed major deviations in population between district, the judge said. Therefore, he ruled, the only alternatives were the Saden plan or no election for the General Assembly.

"The state board plan may not be perfect as we now review it," Judge Sidor wrote. But, he added, "no fair alternative remains."

Mrs. Schaffer sent copies of Judge Sidor's decision Wednesday to each town clerk and registrar of voters in Connecticut without comment, leaving interpretation of it to them.

Earlier she said: "We are going to have enormous problems, but come hell or high water we will meet the court order."

COOL, GREEN, CAMP, KIDS.
THE FRESH AIR FUND.

There's
more
fun in
our
bun



BUN N' BURGER

KLEINDIENST KEPT IN CABINET POST

Continued From Page 1, Col. 7

are qualified to fill the responsibility." He said that President Nixon's record with regard to both groups was "a significant record," and that Mr. Nixon intended to continue to seek and hire "qualified" women and blacks.

He added, "We absolutely will not, however, and the President has stated this quite specifically, we will not appoint people for the purpose of tokenism. No one benefits from that. . . . It is simply not the way the President will proceed."

In response to a question, Mr. Ziegler said that the Republican national platform did not commit Mr. Nixon to appoint a woman to the Cabinet. He added that he felt it was "ironic" that such questions should be raised on the day that Mrs. LaFontant's appointment was announced.

The Republican platform states, "We will work toward appointment of women to highest level positions in the Federal Government, including the Cabinet and the Supreme Court." The platform was adopted at the party's convention last August in Miami Beach.

New Ideas Wanted

Mr. Ziegler was also asked whether the departure of the five top Justice Department staff members—Ralph E. Erickson, the Deputy Attorney General; David L. Norman, the Assistant Attorney General in charge of the Civil Rights Division; Jerris Leonard, the Law Enforcement Assistance Administrator; and Roger C. Cramton and Leo M. Pellerzi, Assistant Attorneys General—indicated a "major shake-up" in the department.

He replied that it was an indication only that the President "wants the second term to be one full of new ideas" and to "make sure that no one becomes stale."

Mr. Erickson and Mr. Norman, he said, will be nominated for important judicial positions, and others will return to their private careers.

Mr. Ziegler said that Mr. Kleindienst's retention would ensure a "continuity of firm leadership" in the Justice Department. Mr. Bork, he said, will fill the position of Deputy Solicitor General until the end of the current term of the Supreme Court next spring, at

which time Mr. Griswold intends to retire.

Replacements for the five departing Justice aides will be announced soon, Mr. Ziegler said.

He also made official yesterday the recent reports that two top officials of the Interior Department, both concerned with the controversial Bureau of Indian Affairs, would be "leaving their posts."

They are Harrison Loesch, the Assistant Secretary for public land management, and Louis R. Bruce, the Commissioner of Indian Affairs. Later in the day, Rogers C. B. Morton, the Secretary of the Interior, announced the resignation of John O. Crow, the Deputy Commissioner of Indian Affairs.

No Praise for Bruce

Mr. Ziegler refused to respond to inquiries about the significance of the fact that Mr. Bruce's departure had been announced with none of the usual accompanying words of praise. Mr. Loesch, for example, was said to have done a "great job" in Mr. Nixon's estimation.

"Mr. Bruce is leaving his post," Mr. Ziegler repeated. "I don't have any comment on that." As for Mr. Bruce's plans, the press secretary would only say, "I'm sure Mr. Bruce will be pursuing other interests."

Mr. Ziegler said that Mr. Loesch would be returning to law practice.

Mr. Nixon, who met at Camp David today with Mr. Bork and his economic advisers, plans to remain there tomorrow, Mr. Ziegler said.

Dr. Bork, a 45-year-old native of Pittsburgh, received his law degree from the University of Chicago and practiced in New York and Chicago before becoming an associate professor of law at Yale in 1962. Three years later he became a full professor. During former President Johnson's Administration, he served on a White House panel working on an antitrust policy.

Among the many important posts that are the subject of speculation is that of the Director of Central Intelligence. The present director, Richard Helms, is rumored to be either moving to a new post or leaving Government service.

James R. Schlesinger, chairman of the Atomic Energy Commission and the man who is rumored to be the leading candidate to replace Mr. Helms, held a news conference today to discuss commission matters. In response to questions about his future, he said, "I have no plans to leave," and that he had not "been requested to move to any other position."

Kleindienst Will Stay On; 5 Justice Aides 'Leaving'

Cabinet Now Complete— Bork of Yale Named Solicitor General

By LINDA CHARLTON
Special to The New York Times

WASHINGTON, Dec. 8

President Nixon completed his second-term Cabinet today with the announcement that Richard G. Kleindienst would remain as Attorney General despite major changes in the top ranks of the Justice Department.

The list of today's second-term nominations, announced by the White House press secretary, Ronald L. Ziegler, also included the names of five top Justice Department aides who will be "leaving their posts."

and the name of Robert H. Bork, a conservative professor at the Yale Law School and an antitrust specialist. He will succeed Erwin N. Griswold as Solicitor General.

Mr. Nixon also nominated Mrs. Jewel LaFontant, a black lawyer and member of the United States delegation to the United Nations, to be Deputy Solicitor General.

Associated Press
Richard G. Kleindienst
after the announcement
that he would stay as the
Attorney General.

This last announcement provoked some dialogue between Mr. Ziegler and the newsmen at Camp David who asked about the absence of blacks and women from the Cabinet.

Mr. Ziegler said, "The President is looking for the best-qualified people to fill particular positions. . . . We're not concerned about any aspect of the individual except that they

Continued on Page 32, Column 5

Views of Review

Against Nixon

TO THE EDITOR:

In an ad in *The Week in Review* Oct. 15, forty-five academicians urged their fellow citizens to vote for Richard Nixon. The endorsement was not very surprising since many of the scholars listed have been "cold war" warriors or "law and order" enthusiasts long before Mr. Nixon occupied the White House.

Their preference for Mr. Nixon over Senator McGovern was simple and direct. They stated their belief that he "has demonstrated the superior capacity for prudent and responsible leadership." This, of course, is a matter of personal preference. One could well present a cogent argument for a contrary position. For example, I believe the President's public pronouncements on every subject . . . are geared for P.R. effect and devoid of serious content.

What is of critical importance, however, is the fine print at the bottom of the page which reads "—published and paid for by the Finance Committee to Re-elect the President." I cannot recall ever having seen a political endorsement listing scholars that was not either organized, sponsored or paid for by the scholars themselves or by an ad hoc committee of acad-

emicians. I find these circumstances to be absolutely appalling. . . .

It is no secret that over the past several years there has been a disturbing trend toward turning the "think-tanks" and institutions of our learned universities into academic catering services for big government and corporations. The consequences of this drift can have a chilling effect on academic freedom. Eminent scholars may create the illusion that they are speaking from a pedestal of a Harvard or a Stanford but they are, in fact, standing on a pedestal erected or supported by the Defense Department or State Department or the various corporate foundations which subsidize their research.

That the G.O.P. war chest can underwrite paid advertisements for academics is but one small example of the serious moral issues that George McGovern is attempting to communicate to the American people. In some cases he is exposing overt corruption; in others he is focusing on a far more insidious corrosion of values. Whatever label one might wish to call it, the subtle process of undermining the critical and cherished institutions of a free and open society can ultimately take us down a road which leads from benign neglect to friendly fascism.

ARTHUR I. BLAUSTEIN
University of California
Berkeley

For Nixon

TO THE EDITOR:

Professor Mark in *The Week in Review* Oct. 22 questions the reasoning that led a number of academics to support the re-election of President Nixon in an advertisement in *The New York Times*. I should like to answer for myself.

The President's Vietnam policy must rank as an outstanding achievement. The war is undoubtedly agonizing, but agony must be endured when the alternatives are worse. Mr. Nixon inherited a war in which America had come to have important national interests at stake, to say nothing of moral responsibility to the South Vietnamese. To propose, as Senator McGovern has done, that we simply surrender is not to find a solution to a terrible problem but simply to deny that there is any problem — except of course the assumed pathological wickedness of the last three Presidents of the United States. Most Americans prefer a leader who attempts to cope intelligently and persistently with reality.

Professor Mark also appears to believe that the President has done something drastic and reprehensible to the Supreme Court. Nothing could be further from the truth. The judicial philosophies of the new justices are far more in line with the historic phi-

losophy of the court than were the views of the dominant wing of the Warren Court. The Warren Court represented a sharp challenge to the traditional relationship of the judiciary to the processes of democratic government. We are in no danger of having our individual liberties unduly contracted by the new court. Rather, we are in for a period of consolidation and, hopefully, a new era of respect for the judgments of the representative branches of government.

One of the strongest reasons for believing that "Richard Nixon has demonstrated the superior capacity for prudent and responsible leadership" is the tone and style of the opposition campaign: shrill, harsh, intolerant, simplistic and overpoweringly self-righteous. The McGovern campaign, as Irving Kristol has noted, may signal the conversion of the Democratic party from a traditional, pragmatic American party to a European-style ideological movement. It is impossible to remain undisturbed by the divisiveness, intolerance and freer scope for authoritarian impulses that this development threatens. A good reason to want a Nixon landslide is that it may return control of the Democratic party to sober and responsible leadership.

ROBERT BORK
Yale Law School
New Haven, Conn.

Antitrust Changes Proposed by Panel

Continued From Page 1, Col. 7

prohibited but that an acquisition of a nondominant company would not be.

If the standards covering conglomerate mergers, as set forth in the task force's report, were enacted into law, some mergers that have recently been attacked by the Justice Department would be legal.

Other recommendations of the task force include a considerable relaxation of the prohibitions against price discrimination contained in the Robinson-Patman Act and considerable tightening of the rules concerning patent licensing.

The task force also proposed a number of other changes in the antitrust laws, including establishment of a 10-year limit on the ability of the Government to undo old mergers.

Appointed in 1967

The task force, which was headed by Prof. Phil C. Neal of the University of Chicago Law School, was appointed by President Johnson in December, 1967, and made its report to him in July, 1968.

For reasons that have never been explained, Mr. Johnson refused to let the report be made public. It was made public today by the Justice Department with the specific concurrence of President Nixon. Richard W. McLaren, head of the Justice Department's antitrust division, said that publication of the report "is not in any sense an official endorsement of it in whole or in part but is simply designed to make the report available for study and comment."

Despite Mr. McLaren's disclaimer, it seems likely that the report will have considerable influence, largely because of the prestige of the task force members, who appeared to have been carefully chosen to represent all viewpoints.

Among the 12 members of the task force, there was only one who dissented from virtually all the major recommendations of the report. That was Prof. Robert H. Bork of Yale, who has long been known as an advocate of almost complete freedom to merge.

More limited dissents were registered by Paul W. MacAvoy, a professor of economics at Massachusetts Institute of Technology, and Richard E. Sherwood, who is in private law practice in Los Angeles.

Grant Companies

The leading companies in the automobile, steel, computer and many other industries would have to be split up if the proposals of the task force to break up oligopolies were adopted.

The task force defines an oligopolistic industry (one dominated by a few companies) as one in which four companies

only permissible means of reducing market shares, although the task force indicated it would probably be the most common one.

But if an adequate reduction of concentration could be achieved through liberalized licensing arrangements or changes in contracts (presumably including Government contracts) then this would be permitted.

As has been the case under present antitrust laws, the standards the task force would set up for disapproval of new mergers would be stricter than those for breaking up old companies.

There would be several different tests for the legality of new mergers — which would actually cover acquisitions by any large company and not just by conglomerates.

First of all, the acquiring company would have to have sales of \$500-million or assets of more than \$250-million for its acquisition of a "leading company" in an industry to be prohibited.

Definition Given

A "leading company" is defined as one of the top four in an industry in which the top four companies have at least 50 per cent of the market. To meet the definition of "leading company" the concern in question would also have to have more than 10 per cent of the market and the market itself would have to involve sales of more than \$100-million.

Under these tests, the Justice Department would not have been able to bring two of the three cases against conglomerate mergers that have been brought since the Nixon Administration came into power.

The acquisition of the Jones & Laughlin Steel Corporation by Ling-Temco-Vought, Inc., would be legal under the task force proposals, because J. & L. ranks only sixth in the steel industry.

The acquisition of the Canteen Corporation by the International Telephone and Telegraph Corporation also would probably be legal under the task force proposals because the top four companies in the food-vending market do not have 50 per cent of the market, nor do they in the narrower market line of in-plant feeding.

It appeared at first glance, however, that today's suit challenging the acquisition of the B. F. Goodrich Company by Northwest Industries, Inc., would still be possible, even if the task force proposals were written into law.

As for the Robinson-Patman Act, the task force proposed that no discriminations in price between different customers be considered illegal unless they (1) were systematic and part of a pattern of favoring larger customers, or (2) threatened

license agreements and would ban enforcement of a patent against some infringers if the patent owner has not taken "reasonable steps" to enforce the patent against others.

Those who signed the entire report, in addition to Professor Neal, were: Prof. William F. Baxter, Stanford University Law School; Prof. Carl H. Fulda, University of Texas Law School; Prof. William K. Jones, Columbia University Law School; Dennis G. Lyons, a lawyer in private practice in Washington, D.C.; James W. McKie, professor of economics at Stanford; Lee E. Preston, associate dean of the Graduate School of Business, University of California at Berkeley; Prof. James A. Rahl, Northwestern University Law School, and George D. Reycraft, a lawyer in private practice in Washington.

**Block a Bid
of Goodrich**
Goodrich
Trust-Law Shift Urged
By EILEEN STANAWAN
Special to The New York Times
WASHINGTON, May 2 —
Radical changes in antitrust laws that would permit the Government to break up large companies that dominate an industry have been recommended by a group of noted lawyers and economists. They were appointed by President Johnson to study the antitrust laws.
The report of the Johnson task force, which was made public today by the Justice Department also recommends legislation spelling out just what kinds of acquisitions may and may not be permitted by the large, widely diversified companies known as conglomerates.
Briefly, this portion of the report proposes that an acquisition by a conglomerate of a company that is among the top four in its industry would be

Continued on Page 75, Column 1

HARTFORD UPSET OVER DISTRICTING

Confusion Follows Rejection
of Plan by Federal Court

By LAWRENCE FELLOWS

Special to The New York Times

HARTFORD, March 31—The ruling of the United States District Court yesterday that declared Connecticut's new legislative reapportionment plan for the General Assembly unconstitutional has thrown election plans and political programs into a state of disarray and confusion.

Registrars in the 169 cities and towns in Connecticut, who have been working overtime for the last couple of months to set up voter lists in the new districts, will have to stop and wait to see when they can start all over again.

The endorsement of candidates for the State Senate and House of Representatives was to have taken place between April 13 and 27, and will have to be postponed, according to Mrs. Gloria Schaffer, Secretary of the State.

The politicians do not even know where to campaign, or which district they hope to represent.

There was no ready answer as to what the parties should do about the state central committee members, who are elected from Senatorial districts, or about their town committee members, many of whom are selected according to House districts.

Formidable Power Base

The town committees are the real power base in Connecticut. They even name the delegates to the state conventions, which in turn name the delegates to the national conventions.

Even these party selection processes are controlled by law in Connecticut, so there can be no way out by mere amicable agreement. Mrs. Schaffer suggested that some legislation would be needed to tide the parties over.

The Democrats were delighted, for the ruling by the three-man Federal Court supported their contention that the election districts for the General Assembly had been redrawn to the Democrats' disadvantage. The Democrats now control both houses.

"It proves we were right," said John M. Bailey, the state Democratic chairman.

The Governor, Thomas J. Meskill, a Republican, expressed disappointment that the whole plan had to be scrapped because of objections to parts of it.

"I had hoped they would have resolved it," he said.

Party Leaders Meet

Leading members of both parties met last night in an attempt to determine how to redraw the lines of their election districts as quickly as possible. The meeting had been called hastily, and, when it appeared nothing much was going to be accomplished last night, it broke up and another session was set for next Tuesday.

The reapportionment plan reduced the number of districts for the House of Representatives from 177 to 151. The num-

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The reapportionment plan reduced the number of districts for the House of Representatives from 177 to 151. The number of Senate districts was left at 30, but the lines were changed drastically.

The lines were drawn by a panel of three state judges, two of them Republicans and one a Democrat, after the General Assembly and a special eight-member commission failed to meet deadlines for action.

There were indications today that a redrawn plan might be presented Tuesday for legislative action. If a revised plan were accepted, however, it still would have to be sent to the court-appointed master, Prof. Robert H. Bork of Yale Law School, whom the Federal Court made responsible for redrawing the lines.

Professor Bork, a Republican, seemed as taken aback by the court ruling as did the politicians. The 45-year-old professor of constitutional law said he did not know how much time he had to complete the job. He said he knew only that his own political outlook could have nothing to do with the task.

ONLY
ICE EVER!

F B I

Date: 12/15/72

Transmit the following in _____
(Type in plaintext or code)Via AIRTEL _____
(Priority)

TO : ACTING DIRECTOR, FBI
FROM : SAC, CHICAGO (161-2424) (P)
SUBJECT: ROBERT HERON BORK
SPECIAL INQUIRY

Rebutel 12/11/72, and New Haven teletype, 12/12/72.

Enclosed are copies of following newspaper articles concerning BORK from the "Chicago Tribune", a daily Chicago newspaper:

- 1) "U.S. Promises to Use Trust Law on Labor" dated 3/4/66.
- 2) "Nixon Revamps Justice Dep't., Retains Kleindienst as Head" dated 12/9/72.
- 3) "Legal Expert Backs Nixon's Busing Plan" dated 5/15/72.
- 4) "U.S. Conglom Policy Critics After Bigger Game - McLaren" dated 10/25/69.
- 5) "Schools Are Warned on Politics" dated 10/7/70.
- 6) "Professors Advise Barry on Platform" dated 3/1/64.
- 7) "Against the Bill" by ROBERT H. BORK, dated 3/1/64 (Civil Rights Bill).

3 - Bureau (Encs. 9)
1 - Chicago
WJB/cad
(4)

ENC. BEHIND FILE

161-9206-21
NOT RECORDED
4 DEC 18 1972Approved: *[Signature]*

Special Agent in Charge.

Sent _____

M

per *[Signature]*

CG 161-2424

Also enclosed are following concerning BORK:

- 1) A pamphlet entitled "Political Activities of Colleges and Universities-Some Policy and Legal Implications", by ROBERT H. BORK, HOWARD G. KRANE and GEORGE D. WEBSTER, dated 10/7/70.
- 2) "National Institute on Prices and Pricing Under the Antitrust Laws" by American Bar Association. Debate on question "Resolved: Present Antitrust Restraints on Pricing should be Relaxed". First affirmative paper by ROBERT H. BORK. Pages eight through fifteen, Antitrust Law Journal, Vol. 41, Issue 1. (Entire volume enclosed)

Results of investigation will be submitted by teletype with report following.

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE RICHMOND	OFFICE OF ORIGIN BUREAU	DATE 12/15/72	INVESTIGATIVE PERIOD 12/14/72
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY SA 	TYPED BY mhh
		CHARACTER OF CASE SPI	

b6
b7CREFERENCES:

New Haven teletype to the Bureau 12/13/72;
Richmond teletype to the Bureau 12/14/72.

-RUC-

ACCOMPLISHMENTS CLAIMED				☒ NONE	ACQUIT- TALS	CASE HAS BEEN: PENDING OVER ONE YEAR ☐ YES ☐ NO PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☐ NO
CONVIC.	FUG.	FINES	SAVINGS	RECOVERIES		
APPROVED RDR/yo					SPECIAL AGENT IN CHARGE	
COPIES MADE: 3 - Bureau 1 - Richmond (161-1329)					DO NOT WRITE IN SPACES BELOW 161-7206-22 NOT RECORDED 16 DEC 18 1972 Spec. Inv.	
Dissemination Record of Attached Report					Notations	
Agency	one cc Deputy A.G.					
Request Recd.	JAN 3 1973					
Date Fwd.	58 FEB 5 1973					
How Fwd.	137					
By						

-A*-

COVER PAGE

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to:

Report of: SA [REDACTED] Office: Richmond
Date: December 15, 1972
Field Office File #: 161-1329 Bureau File #:
Title: ROBERT HERON BORK

b6
b7C

Character: SPECIAL INQUIRY

Synopsis:

BORK current member of Board of Directors of Thomas Jefferson Center Foundation of UVA, Charlottesville, Va. [REDACTED] of Foundation, although having limited personal contact with BORK, considers him reputable, responsible person, well regarded in his field and well suited for position of trust and confidence in Government. No record of arrest at Charlottesville, Va.

-RUC-

DETAILS:AT CHARLOTTESVILLE, VIRGINIA:EMPLOYMENT

[REDACTED]
University of Virginia (UVA), [REDACTED] of the Thomas Jefferson Center Foundation, advised on December 14, 1972, that ROBERT HERON BORK is a current member of the Board of Directors of the Foundation, although a relatively recent member. [REDACTED] advised that the Thomas Jefferson Center Foundation is an independent entity within the College of Arts and Sciences at UVA with general aims of promoting discussion and study in political ecology and also sponsors visiting scholars and awards of fellowship.

RH 161-1329

[] advised that BORK was one of several names suggested for the Foundation, which is principally responsible for funding of the operation of the Thomas Jefferson Center Foundation, and has attended only one meeting in his capacity as a member of the Board, which meeting was held in Washington, D. C. [] stated that he personally has met and talked to BORK on only one occasion, although he has heard lectures given by BORK. He advised no one at UVA would be acquainted with BORK; however, former chairman of the Department of Ecology, WARREN G. NUTTER, now Assistant Secretary of Defense at Washington, D. C., knows BORK well.

b6
b7C

[] stated he considers BORK to be reputable and responsible, well regarded in his field of law and certainly well suited for a position of trust and confidence with the Government.

ARREST

On December 14, 1972, [] Service Department, Charlottesville Police Department, advised a search of the records of that Department, failed to locate any record of arrest for ROBERT HERON BORK.

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE SAN FRANCISCO	OFFICE OF ORIGIN BUREAU	DATE 12/15/72	INVESTIGATIVE PERIOD 12/14/72
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY 	TYPED BY amc.
		CHARACTER OF CASE SPECIAL INQUIRY	

b6
b7CREFERENCES:

Los Angeles teletype to San Francisco, 12/13/72.
Bureau teletype 12/14/72.

RUC

ACCOMPLISHMENTS CLAIMED					☐ NONE	ACQUIT- TALS	CASE HAS BEEN: PENDING OVER ONE YEAR ☐ YES ☐ NO PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☐ NO
CONVIC.	FUG.	FINES	SAVINGS	RECOVERIES			
APPROVED: <i>awb-214</i>						SPECIAL AGENT IN CHARGE	
COPIES MADE: 3- Bureau (AMSD) 1- San Francisco (161-2090)						DO NOT WRITE IN SPACES BELOW 161-9206-23 NOT RECORDED 2 DEC 18 1972	
Dissemination Record of Attached Report						Notations	
Agency	one to Deputy AG					<i>Spec. Inq.</i>	
Request Recd.	58 FEB 5 1973						
Date Fwd.	JAN 3 1973						
How Fwd.							
By							

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to:

Report of:

Date:

12/15/72

Office: San Francisco

b6
b7C

Field Office File #: 161-2090

Bureau File #:

Title:

ROBERT A. AARON BORK

Character:

SPECIAL INQUIRY

Synopsis:

AARON DIRECTOR interviewed. Favorable recommendation set forth.

RUC

DETAILS: AT STANFORD, CALIFORNIA

On December 15, 1972 AARON DIRECTOR, Scholar in Residence, Stanford Law School, Stanford University, advised that Appointee had been both a student and teaching fellow at the University of Chicago. He stated that he had been closely acquainted with Appointee in a student instructor capacity and had also had opportunity to become well acquainted with him socially.

He stated that although Appointee was single during his early years at the University of Chicago, he married prior to leaving and as a result, DIRECTOR stated he had had opportunity to become acquainted with Appointee's wife. He described both as being of impeccable character and knew of no reason to question integrity, loyalty, or association of either. He described BORK as being the best student he has ever had. He stated that BORK's area of study had been

SF 161-2090
FEH/amc

primarily anti-trust law and he described him as being an expert in this area. He stated that BORK is certainly respected professionally and he concluded by recommending him highly for a position involving trust and confidence.

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

NR. 008 PH PLAIN

745 PM 12-15-72 NITEL MCA

TO ACTING DIRECTOR

FROM PHILADELPHIA (161-1990) (RUC)

DEC 15 1972

TELETYPE

ROBERT HERON BORK; SPIN

Mr. Felt	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. C.	_____
Mr. Galt	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, E.S.	_____
Mr. Purvis	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Ms. Herwig	_____
Mrs. Neenan	_____

MR. MARTIN
ROOM 1100

RE PITTSBURGH TELETYPE TO BUREAU AND PHILADELPHIA

12/13/72.

RECORDS, BVS, HARRISBURG, PA., REFLECT BORK BORN
3/1/27 AT PITTSBURGH, PA. PARENTS LISTED AS HARRY PHILIP
BORK AND ELIZABETH MILDRED KUNKLE. BIRTH RECORD FILED
UNDER FILE NUMBER 34489-27. FILING DATE, 3/14/27.

UACB, NO REPORT WILL BE SUBMITTED.

E N D

JDJ FBI WASH DC C

R

of

161-9206-24

NOT RECORDED

12 JAN 31 1973

137
58 FEB 5 1973

Sp72 Inc 14

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 15 1972

TELETYPE

Mr. Felt	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. Dalbey	_____
Mr. Gebhardt	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, E.S.	_____
Mr. Purvis	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Ms. Herwig	_____
Mrs. Neenan	_____

ST NR 001 NH PLAIN

1:20PM URGENT 12-15-72 JML

TO: ACTING DIRECTOR

FROM: NEW HAVEN (161-1518) (P) 5 PAGES

ROBERT HERON BORK, SPECIAL INQUIRY

CREDIT AND ARREST:

[REDACTED], CLERK, CREDIT BUREAU OF LITCHFIELD
COUNTY, TORRINGTON, CONN., WHICH ALSO COVERS THE TOWN OF
LAKEVILLE, ON DECEMBER FOURTEEN LAST, ADVISED RECORDS CONTAIN
NO INFO IDENTIFIABLE WITH APPOINTEE.

THE TOWN OF LAKEVILLE MAINTAINS NO FULL TIME LAW ENFORCE-
MENT AGENCY AND POLICE PROTECTION IS PROVIDED BY THE CONNECTICUT
STATE POLICE.

TROOPER [REDACTED], CANAAN BARRACKS, CONNECTICUT STATE
POLICE, ON DECEMBER FOURTEEN LAST, ADVISED RECORDS CONTAIN NO
INFO PERTAINING TO APPOINTEE.

MISCELLANEOUS:

ON DECEMBER FOURTEEN LAST, REVEREND [REDACTED],
ASSOCIATE CHAPLAIN, YALE UNIVERSITY, ADVISED THAT THE APPOINTEE IS
UNKNOWN TO HIM; HOWEVER, HE IS FAMILIAR WITH HIS REPUTATION

END PAGE ONE

58 FEB 5 1973

MR. MARTIN
ROOM 116

b6
b7C

161-9206-25
NOT RECORDED
12 JAN 31 1973

SP-1 Inq.

PAGE TWO NH (161-1518)

AND STATED THAT THE APPOINTEE IS A HIGHLY REGARDED AND WELL RESPECTED MEMBER OF YALE'S ACADEMIC COMMUNITY. HE COULD FIND NO REASON TO OBJECT TO THE APPOINTEE'S EMPLOYMENT BY THE U.S. GOVERNMENT.

X ON DECEMBER FOURTEEN LAST, WILLIAM SLOANE COFFIN, JR., UNIVERSITY CHAPLAIN AND PASTOR OF THE CHURCH OF CHRIST, YALE UNIVERSITY, ADVISED THAT HE HAS MET THE APPOINTEE ON SEVERAL OCCASIONS AND IT IS HIS BELIEF THAT THE APPOINTEE IS A VERY INTELLIGENT MAN AND A THOROUGHLY LOYAL AMERICAN. REVEREND COFFIN ADVISED THAT THE APPOINTEE IS HIGHLY RESPECTED ON THE YALE CAMPUS FOR HIS SCHOLARLY ABILITY, BOTH AS A LAWYER AND AS AN INSTRUCTOR. REVEREND COFFIN FREELY ADMITTED HIS PERSONAL OBJECTION TO PRESIDENT NIXON AND INDICATED THAT HE FELT THE APPOINTEE WOULD HOLD SIMILAR VIEWS AS THE PRESIDENT. COFFIN ADVISED THAT HIS OWN PERSONAL POLITICAL BELIEFS HAVE BEEN PUBLICLY STATED ON NUMEROUS OCCASIONS AND HE DID NOT FEEL IT WAS NECESSARY TO ELABORATE ON THIS AT THIS TIME.

COFFIN TERMINATED THE INTERVIEW BY STATING THAT IN REGARD
END PAGE TWO

PAGE THREE NH (161-1518)

TO THE APPOINTEE'S CHARACTER, LOYALTY AND REPUTATION, HE
WOULD HAVE NO OBJECTION TO HIS EMPLOYMENT BY THE U.S.
GOVERNMENT IN A POSITION OF SENSITIVITY AND TRUST.

ON JANUARY FIFTH, NINETEEN SIXTYEIGHT, WILLIAM
SLOANE COFFIN WAS INDICTED BY A FEDERAL GRAND
JURY IN BOSTON, MASS., CHARGED WITH CONTINUING
TO AID, ABET AND COUNSEL VIOLATIONS OF THE
SELECTIVE SERVICE LAWS, TITLE FIFTY, USC,
APPENDIX SECTION FOUR SIX TWO A.

ON JUNE FOURTEEN NINETEEN SIXTYEIGHT, COFFIN
WAS FOUND GUILTY IN USDC, BOSTON, MASS., AND
ON JULY ELEVEN, NINETEEN SIXTYNINE, U.S. COURT
OF APPEALS FIRST CIRCUIT COURT, BOSTON, MASS.,
ORDERED A NEW TRIAL. ON APRIL FIFTEEN, NINETEEN
SEVENTY, USA, BOSTON, MASS., DECLINED FURTHER
PROSECUTION.

ON DECEMBER FOURTEEN LAST RABBI ARNOLD JACOB WOLF,
DIRECTOR OF THE B'NAI B'RITH HILLEL FOUNDATION AT YALE,
ADVISED THAT HE HAS SEEN THE APPOINTEE ON TWO OCCASIONS
END PAGE THREE

PAGE FOUR NH (161-1518)

BUT HAS NEVER MET HIM PERSONALLY. HE KNOWS OF HIM, HOWEVER BY REPUTATION AND ADVISED THAT THE APPOINTEE IS WIDELY REGARDED AS AN EXCELLENT SCHOLAR, A LOYAL AMERICAN, AND HE FEELS THAT THERE COULD BE NO OBJECTION TO HIS APPOINTMENT TO A POSITION OF SECURITY AND TRUST WITH THE U.S. GOVERNMENT BASED ON HIS CHARACTER OR ABILITY. WOLF STATED THAT TO THE BEST OF HIS KNOWLEDGE THE APPOINTEE HAS NEVER BEEN CONNECTED WITH OR OUTSPOKEN ON ANY RELIGIOUS OR CIVIL RIGHTS ISSUED AND, THEREFORE, HE DID NOT FEEL THAT HE COULD COMMENT REGARDING BORK'S ATTITUDES IN THIS AREA.

ARNOLD JACOB WOLF, FORMER RABBI OF THE SOLEL CONGREGATION, HIGHLAND PARK, ILLINOIS, IN APRIL, NINETEEN SIXTYTWO, OFFERED HIS SERVICES AS PERSONAL ADVISOR ON BEHALF OF [REDACTED]
[REDACTED]. IN MARCH, NINETEEN SIXTYTHREE, WOLF WAS NOMINATED VICE CHAIRMAN OF THE CHICAGO COMMITTEE TO DEFEND THE BILL OF RIGHT (CCDBR) AND, IN AUGUST, NINETEEN SIXTY FIVE, WAS ELECTED CO-CHAIRMAN OF

END PAGE FOUR

b6
b7C

PAGE FIVE NH (161-1518)

A COMMITTEE TO COMBAT NAZIISM (NCCND). IN JUNE, NINETEEN SIXTYSIX, HE WAS APPOINTED TO SERVE ON THE RESIDENT COMMITTEE OF THE NATIONAL COMMITTEE TO REPEAL THE MC CARRON ACT (NCRMA).

ON DECEMBER FIFTEEN, NINETEEN SEVENTYTWO, [REDACTED]

[REDACTED], SECRETARY, MADISON TOWERE APARTMENT, ONE ELEVEN PARK STREET, NEW HAVEN, CONN., ADVISED THAT HARRY R. BORK AND ELIZABETH M. BORK, FATHER AND MOTHER OF THE APPOINTEE, RESIDE IN THAT BUILDING.

b6
b7C

ON DECEMBER FIFTEEN, SEVENTYTWO, [REDACTED] RECORDING SECRETARY, YALE UNIVERSITY, RETIRED SA, FBI, ADVISED FROM HIS PERSONAL KNOWLEDGE THAT THE NEW HAVEN LAWN CLUB, TO WHICH THE APPOINTEE BELONGS, HAS NO POLICY OF DISCRIMINATION AS TO RACE OR RELIGION AND, IN FACT, NOTED THAT IT IS THE POLICY OF THIS CLUB TO RECRUIT MEMBERS FROM MINORITY GROUPS.

NEW HAVEN INVESTIGATION COMPLETED.

REPORT FOLLOWS.

END

LS XXX LXS FBI WASH DC CLR

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 15 1972

TELETYPE

NR 017 SF PLAIN

8:08 PM NITEL 12-15-72 MEB

TO: ACTING DIRECTOR

FROM: SAN FRANCISCO (161-2090) (RUC) (1P)

ROBERT HERON BORK, SPECIAL INQUIRY.

RE LOS ANGELES TELETYPE TO SF, DECEMBER THIRTEEN, LAST, AND BUREAU TELETYPE, DECEMBER FOURTEEN, NINETEEN SEVENTYTWO.

AARON DIRECTOR, SCHOLAR IN RESIDENCE, STANFORD LAW SCHOOL, ADVISED TODAY THAT APPOINTEE FORMER STUDENT AND TEACHING FELLOW AT UNIVERSITY OF CHICAGO, DIRECTOR ACQUAINTED WITH STUDENT INSTRUCTOR CAPACITY AS WELL AS SOCIALLY. HAS MET APPOINTEE'S WIFE AND HAS HAD OCCASION TO VISIT IN THEIR HOME. CHARACTERIZED BOTH AS BEING OF EXCEPTIONAL CHARACTER AND UNQUESTIONED LOYALTY. DESCRIBED BORK AS BEING BEST STUDENT HE HAS EVER HAD. STATED BORK EXPERT IN ANTI TRUST LAW AND RESPECTED AND HIGHLY REGARDED PROFESSIONALLY.

CONCLUDED BY HIGHLY RECOMMENDING APPOINTEE FOR POSITION OF TRUST AND CONFIDENCE.

REPORT MAILED AMSD DECEMBER FIFTEEN, INSTANT.

END

HOLD WASH 58 FEB 5 1973

Mr. Felt	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. Dalbey	_____
Mr. Gebhardt	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, ES.	_____
Mr. ...	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Mr. Hawley	_____
Mr. Keenan	_____

MR. MARTIN
ROOM 1248

NOT RECORDED

112 JAN 31 1973

Spec. Inq.

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE WASHINGTON FIELD	OFFICE OF ORIGIN BUREAU	DATE 1/16/73	INVESTIGATIVE PERIOD 12/29/72-1/15/73
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY SA 	TYPED BY av b6 b7C
THIS REPORT COMPLETES THE INVESTIGATION.		CHARACTER OF CASE SPIN	

REFERENCE: WFO report to Bureau, 12/29/72.

-RUC-

ADMINISTRATIVE: United States Government records referred to in text of report are records of the Passport Office, United States State Department.

ACCOMPLISHMENTS CLAIMED ☐ NONE					ACQUIT- TALS	CASE HAS BEEN: PENDING OVER ONE YEAR ☐ YES ☐ NO PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☐ NO
CONVIC.	FUG.	FINES	SAVINGS	RECOVERIES		
APPROVED <i>M/EN</i> COPIES MADE: ③-Bureau 1-WFO (161-8634)					DO NOT WRITE IN SPACES BELOW	
					161-9206- 27 NOT RECORDED (12 JAN 31 1973)	
Dissemination Record Deputy Chief Report					Notations <i>Spec. Inq.</i>	
Agency						
Request Recd.		JAN 18 1973				
Date Fwd.	58 FEB 5 1973					
How Fwd.	13					
By						

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to:

Report of:

Date:

1/16/73

Office: Washington, D.C.

b6

b7C

Field Office File #: 161-8634

Bureau File #:

Title: ROBERT HERON BORK

Character: SPECIAL INQUIRY

Synopsis:

United States Government records disclose passport issued to the appointee on August 24, 1970 for a visit to England and West Germany. Passport also issued July 23, 1965 for a visit to Italy and England. On May 15, 1968 latter passport was renewed for a one year visit to European countries.

-RUC-

DETAILS: AT WASHINGTON, D.C.

WFO 161 -8634

RMS:avl

1

MISCELLANEOUS

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United States Government records reviewed by SC []
[] on January 15, 1973 disclosed that the appointee was issued passport number A 1775613 on August 24, 1970 at New York for an eight day visit to West Germany and England for the purpose of "Attending Conference". The appointee listed his birth date as March 1, 1927 and place of birth as Pittsburgh, Pennsylvania

On July 23, 1965, the appointee was issued passport number F 800874, at Boston, Massachusetts, for a ten day visit to Italy and England for the purpose of attending a "Conference".

On May 15, 1968, the above passport was renewed at Boston, Massachusetts for a one year visit to England, Holland, Germany, Switzerland, Italy and Austria for the purpose of "Sabbatical Leave, Research and Writing".

F B I

Date: 12/18/72

Transmit the following in PLAINTEXT
(Type in plaintext or code)

Via TELETYPE URGENT
(Priority)

TO: ACTING DIRECTOR, FBI (BY COURIER)

FROM: SAC, ALEXANDRIA (161-1875) (P)

ROBERT HERON BORK, SPECIAL INQUIRY, BUREAU DEADLINE:
DECEMBER EIGHTEEN, NINETEEN SEVENTY TWO (WITHOUT FAIL).

REFERENCE RICHMOND TELETYPE TO THE BUREAU, DECEMBER FOUR-
TEEN, LAST.

HONORABLE G. WARREN NUTTER, ASSISTANT SECRETARY OF
DEFENSE FOR INTERNATIONAL SECURITY AFFAIRS, PENTAGON, ADVISED
HE THROUGH ACADEMIC PURSUITS HAS KNOWN THE APPOINTEE FOR
OVER EIGHT YEARS. BOTH HAVE BEEN AND ARE MEMBERS OF THE
MONT PELERIN SOCIETY AND INTERNATIONAL SOCIETY OF ECONOMISTS,
LAWYERS AND POLITICAL SCIENTISTS WHOSE COMMON INTEREST IS THE
PRESERVATION OF FREE DEMOCRATIC SOCIETY. 161-9206-28

THE APPOINTEE IS A TRUSTWORTHY, FIRST RATE, VERY FINE
PERSON AND THERE IS NO QUESTION ON HIS QUALIFICATIONS AS A
LAWYER. NOTHING DEROGATORY IS KNOWN CONCERNING HIS CHARACTER,
REPUTATION, MORALS OR INTEGRITY AND THERE IS NO SHADOW OF DOUBT
END PAGE ONE.

1- Bureau (By Courier)
1- Alexandria
FL:mew
(2) mew

NOT RECORDED
10 DEC 19 1972

58 FEB 5 1973

Approved: CB
Special Agent in Charge

Sent M Per

F B I

Date:

Transmit the following in _____
(Type in plaintext or code)

Via AX 161-1875 _____
(Priority)

PAGE TWO

CONCERNING HIS LOYALTY TO OUR POLITICAL SYSTEM. THE
APPOINTEE IS RECOMMENDED FOR A POSITION OF TRUST AND
CONFIDENCE.

ALEXANDRIA WILL REPORT RESULTS OF NIS CHECK WHEN MADE
AVAILABLE.

ALEXANDRIA REPORT FOLLOWS.

END.

Approved: _____
Special Agent in Charge

Sent _____ M Per _____

NR009 NY PLAIN

722PM NITEL 12-18-72 PJR

TO ACTING DIRECTOR

FROM NEW YORK 161-4282 1P

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 18 1972

TELETYPE

Mr. Felt	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. Dalbey	_____
Mr. Gebhardt	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, E.S.	_____
Mr. Purvis	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Ms. Herwig	_____
Mrs. Neenan	_____

ROBERT HERON BORK, SPECIAL INQUIRY, BUDED DECEMBER
EIGHTEEN INSTANT.

REFERENCE NEW HAVEN TELETYPE, DECEMBER TWELVE, LAST.

ON DECEMBER FIFTEEN LAST [REDACTED],

PERSONNEL, WILKIE, FARR, GALLAGHER, WALTON AND FITZ GIBBONS,
ONE CHASE MANHATTAN PLAZA, NYC, ADVISED ROBERT HERON BORK,
BORN MARCH ONE, TWENTY SEVEN, PITTSBURGH, PENNSYLVANIA,
EMPLOYED AS ATTORNEY FROM SEPTEMBER TWENTY SEVEN, FIFTY FOUR.
ADVISED THERE WAS NO TERMINATION DATE NOTED FOR APPOINTEE.
ADVISED NOTHING UNFAVORABLE REFLECTED ON RECORD. NOT KNOWN
TO CURRENT EMPLOYEES. NOT ADMITTED FIRST OR SECOND DEPARTMENT,
NEW YORK STATE SUPREME COURT. NO RECORD GRIEVANCE COMMITTEE
OR MEMBERSHIP BAR ASSOCIATIONS.

CREDIT AND ARREST NEGATIVE FOR APPOINTEE.

NYO CONTINUING EFFORTS TO OBTAIN PERTINENT COPIES
OF ARTICLES WRITTEN BY APPOINTEE IN FORTUNE MAGAZINE.
END.

PLS HOLD

MR. MARTIN
ROOM 1246

b6
b7C

of

161-9206-29

NOT RECORDED

12 JAN 31 1973

Spec. Inq.

158 FEB 5 1973

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

NR008 OG PLAIN

DEC 18 1972

635PM URGENT 12-18-72 DJD

TO: ACTING DIRECTOR, FBI

TELETYPE

FROM: SAC, CHICAGO (161-2424) (P) 3 IMP

Mr. Felt	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. Dalbey	_____
Mr. Gebhardt	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, E.S.	_____
Mr. Purvis	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Ms. Herwig	_____
Mrs. Neenan	_____

ROBERT HERON BORK, SPECIAL INQUIRY

REBUTEL DECEMBER 11 LAST AND CHICAGO AIRTEL TO DIRECTOR DECEMBER 15 LAST. FOLLOWING INVESTIGATION WAS CONDUCTED FROM DECEMBER 13 THROUGH DECEMBER 18.

EDUCATION - UNIVERSITY OF CHICAGO (U OF C), CHICAGO, ILLINOIS.

[REDACTED] REGISTRAR'S OFFICE, ADVISED BORK ADMITTED TO U. OF C. 1947, WITH ADVANCED STANDING AND WAS AWARDED AB DEGREE WITH HONORS DECEMBER, 1948.

[REDACTED], REGISTRAR, U OF C LAW SCHOOL, ADVISED BORK ATTENDED FROM 48 TO 50 WHEN RECALLED TO MILITARY SERVICE. HE RETURNED JUNE, 1952, AND WAS AWARDED JD DEGREE JUNE, 1953, RANKING THIRD IN CLASS OF 53. WAS ASSOCIATE EDITOR OF LAW REVIEW AND ELECTED TO ORDER OF COIF. RECORD ALSO REFLECTS ELECTION TO PHI BETA KAPPA AS UNDERGRADUATE. BORG ELECTED PROFESSIONAL OPTION IN EFFECT AT THAT TIME ENTERING LAW SCHOOL AND COMPLETING WORK ON UNDERGRADUATE DEGREE AT SAME TIME.

[REDACTED], PROFESSOR OF LAW, RECALLED BORK AS LAW STUDENT AND POST GRADUATE RESEARCH ASSOCIATES HAD NO

END PAGE ONE 137
1cc 8 FEB 5 1973

161-9206-30
NOT RECORDED
12 JAN 31 1973

Specimen

PAGE TWO

REASON TO DOUBT CHARACTER, REPUTATION, MORALS OR LOYALTY TO UNITED STATES. STATED BORK REGARDED AS A CONSERVATIVE, WAS WELL RESPECTED AND RECOMMENDED HIM FOR POSITION OF SOLICITOR GENERAL.

[REDACTED], PROFESSOR OF LAW, KNEW BORK AS STUDENT, PRACTICING ATTORNEY AND COLLEAGUE AT YALE UNIVERSITY. TERMED HIM STERLING INDIVIDUAL AND COMPETENT. REGARDS HIGHLY BOTH PERSONALLY AND PROFESSIONALLY, KNOWS NOTHING OF AN ADVERSE NATURE CONCERNING HIM AND RECOMMENDED FOR POSITION OF SOLICITOR GENERAL.

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EMPLOYMENT - KIRKLAND AND ELLIS, ATTORNEYS AT LAW,
130 EAST RANDOLPH STREET, CHICAGO, ILLINOIS.

[REDACTED] BORK'S
FILE WHICH REFLECTED HE BEGAN EMPLOYMENT OCTOBER, 1955.
DOES NOT SHOW DATE CEASED EMPLOYMENT. FILE CONTAINS
NOTHING OF ADVERSE NATURE. RESUME SUBMITTED BY BORK
AT OUTSET OF EMPLOYMENT STATED PUBLISHED FOLLOWING ARTICLES:
1. COMMENT, EXTENSION OF RELIEF FOR UNILATERAL MISTAKE,
17 U OF C LAW REVIEW, 725-733 (1950). 2. VERTICAL INTEGRA-
TION AND THE SHERMAN ACT: THE LEGAL HISTORY OF AN ECONOMIC
END PAGE TWO

PAGE THREE

MISCONCEPTION, 22 U OF C LAW REVIEW, 157-201 (1954). COHIS
DOES NOT KNOW BORK.

HAMMOND CHAFFETZ, SENIOR PARTNER, ADVISED BORK LEFT
FIRM IN '62 TO ACCEPT LAW PROFESSORSHIP, YALE UNIVERSITY.
CHAFFETZ SAID HE RECRUITED BORK IN 1955 FROM NEW YORK LAW
FIRM WITH WHOM THEN EMPLOYED. STATED BORK'S WORK WITH HIS
FIRM WAS PRIMARILY ANTITRUST WORK BUT INCLUDED OTHER MATTERS.
PRACTICE WAS EXCLUSIVELY IN FEDERAL COURTS AND INVOLVED NO
CRIMINAL WORK. STATED BORK BRILLIANT LAWYER, EXCELLENT
BRIEF WRITER AND MAN OF EXCELLENT CHARACTER, PERSONAL HABITS
AND LOYALTY. SAID BORK HELPED PRESIDENT NIXON IN PREPARING
BUSING LEGISLATION ADVOCATING BUSES UNDER LIMITED CIRCUM-
STANCES. HE TERMED BORK A "DEVIL'S ADVOCATE" IN THAT HE
LIKED TO EXPLORE ESTABLISHED LEGAL POSITIONS TO DETERMINE IF
THEY ARE SOUND. IN THESE INSTANCES HE OFTEN CLASHED WITH
OTHER LEGAL SCHOLARS. HE STATED HOWEVER THAT BORK IS
INTELLECTUALLY HONEST AND IF HE IS APPOINTED TO THE POSITION
OF SOLICITOR GENERAL, HE WILL BE THE LAWYER FOR THE DEPARTMENT
OF JUSTICE AND WILL SUPPORT THE GOVERNMENT'S LEGAL POSITION.
HE ADDED BORK BELONGED TO NO EXTREMIST ORGANIZATION
END PAGE THREE

PAGE FOUR

AND HELD NO EXTREMIST VIEWS. HE ADDED LAWYERS, EVEN THOUGH AGAINST HIS VIEWPOINTS, RESPECT HIM. HE RECOMMENDED HIM HIGHLY FOR THE POSITION OF SOLICITOR GENERAL.

[REDACTED], MEMBER OF FIRM, ADVISED BORK WORKED WITH HIM IN ANTITRUST CASES WHICH WERE CIVIL CASES INVOLVING SUITS FOR TREBLE DAMAGES AND NOT CRIMINAL MATTERS. STATED BORK HAS FIRST CLASS LEGAL MIND, TREMENDOUS WRITING ABILITY AND THEY WERE SORRY TO LOSE HIM. HIS REASON FOR LEAVING WAS THAT HE WOULD HAVE MORE OPPORTUNITY FOR WRITING AS A LAW PROFESSOR THAN AS PRACTICING LAWYER. HE KNEW BORK AND HIS WIFE SOCIALLY AND CONSIDERS BOTH REPUTABLE PERSONS OF MODERATE HABITS. HE STATED BORK'S WRITINGS HAVE BEEN ON CONSERVATIVE SIDE BUT THAT HE IS NOT AN EXTREMIST IN ANY MANNER. HE RECOMMENDED HIM HIGHLY FOR POSITION OF SOLICITOR GENERAL.

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[REDACTED], STATED WORKED WITH BORK ON ANTITRUST, ESTATE AND CORPORATE MATTERS. STATED HE IS TERRIFIC STUDENT AND LAWYER AND NOT "AN EGGHEAD". STATED HE APPROACHES MATTERS FROM LEGAL AND ECONOMIC STANDPOINT AND IS EXCELLENT ECONOMIST. REGARDLESS OF PERSONAL VIEWS,

END PAGE FOUR

PAGE FIVE

WHEN REPRESENTING A LITIGANT, DOES SO TO FULLEST EXTENT CONSISTENT WITH LAW. STATED HE IS NOT AN ARCH CONSERVATIVE, HAS NO RACIAL PREJUDICES AND RESPECTS CIVIL RIGHTS OF INDIVIDUALS. BORK RESIGNED FROM FIRM SHORTLY AFTER HAVING BEEN MADE JUNIOR PARTNER. HE RECOMMENDED HIM WITHOUT QUALIFICATION.

[REDACTED], ATTENDED U OF C WITH BORK AND KNOWS SOCIALLY AND PROFESSIONALLY. STATED HE IS INCISIVE, ANALYTICAL WITH INQUIRING MIND. STATED HE LIKES TO TEST VALIDITY OF ESTABLISHED POSITION TO SEE IF TRUE. STATED IS INDEFATIGABLE WORKER OFTEN WORKING FAR INTO THE NIGHT. STATED BORK'S ANTITRUST VIEWS SOMEWHAT DIFFERENT FROM COURT DECISIONS IN THAT HE THINKS TOO MUCH REGULATION MAKES COMPANIES ANTI-COMPETITIVE. HE KNOWS NOTHING IN BACKGROUND OR ASSOCIATIONS WHICH WOULD EMBARRASS BORK AS SOLICITOR GENERAL AND RECOMMENDED HIGHLY.

[REDACTED], STATED HE IS ONE OF BORK'S "LIBERAL FRIENDS", HAS WORKED WITH HIM AND COLLABORATED WITH HIM ON PAPER ENTITLED "POLITICAL ACTIVITIES OF COLLEGES AND UNIVERSITIES - SOME POLICY AND LEGAL IMPLICATIONS".

END PAGE FIVE

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PAGE SIX

CONSIDERS ENORMOUSLY BRIGHT AND MAN OF INTEGRITY AND FAIRNESS. STATES BORK HAS BEEN A "CRITIC OF THE WARREN SUPREME COURT" AND BELIEVES THAT COURT HAS GONE TOO FAR IN USING ANTITRUST LAWS FOR THINGS THEY WERE NOT INTENDED FOR. HE ADDED, HOWEVER, THAT BORK BELIEVES IN ANTITRUST LAWS WITH SOME MODIFIED APPLICATIONS. STATED BORK, WHILE WITH HIS FIRM, DID NO COMMUNITY WORK OR CIVIC WORK BUT SPENT ENTIRE TIME IN LAW PRACTICE. HE STATED BORK WORKED UNDER HIM AT THE OUTSET BUT LATER BORK BECAME THE PRINCIPAL AND HE WAS THE HELPER. BELIEVES BORK EXCELLENT CHOICE FOR SOLICITOR GENERAL.

JUDGES, US DISTRICT COURT, CHICAGO, ILLINOIS.

HON. EDWIN A. ROBSON, CHIEF JUDGE, STATED UNABLE TO RECALL BORK EVER APPEARING BEFORE HIS COURT, BUT HAS MET SOCIALLY. SINCE THE PUBLICITY CONCERNING HIS APPOINTMENT AS SOLICITOR GENERAL, EVERYTHING HE HAS HEARD CONCERNING HIM HAS BEEN FAVORABLE. HE RECOMMENDED HIM.

HON. J. SAM PERRY, SENIOR JUDGE, ADVISED BORK APPEARED BEFORE HIM IN SEVERAL CASES AND WAS "ALWAYS ON THE BALL". HE WAS USUALLY ASSISTING OTHERS, BUT OFTEN APPEARED TO BE THE BRAINS OF THE PRESENTATIONS. IT WAS HIS OPINION THAT

END PAGE SIX

PAGE SEVEN

BORK USUALLY ENTERED THE PICTURE WHEN LEGAL PROBLEMS OCCURRED. STATES EXCELLENT LAWYER WHO WROTE CONVINCING BRIEFS. HE RECOMMENDED BORK FOR POSITION OF SOLICITOR GENERAL STATING HE IS BETTER COURT THAN JURY MAN.

HON. WILLIAM J. CAMPBELL, SENIOR JUDGE STATED BORK HAS APPEARED IN HIS COURT ON SEVERAL OCCASIONS, AND ALTHOUGH DOES NOT KNOW PERSONALLY, CONSIDERS CAPABLE ATTORNEY. RECALLED ONE CASE WHERE HE SENT BORK AND AN OPPOSING ATTORNEY TO PHILADELPHIA TO TAKE DEPOSITIONS IN ORDER TO GET CERTAIN EVIDENCE BEFORE THE COURT, AND BORK DID EXCELLENT JOB. HE RECOMMENDED HIM FOR POSITION OF SOLICITOR GENERAL.

MIDWEST OFFICE US ANTITRUST DIVISION, CHICAGO ~~DEPARTMENT~~ ILLINOIS.

[REDACTED], ADVISED NOT IN CHICAGO WHEN BORK PRACTICED, AND MET ONLY ONCE ABOUT THREE YEARS AGO AT CORPORATE COUNCIL INSTITUTE. KNOWS BY REPUTATION ONLY AND KNOWS OF NO REASON TO OBJECT TO APPOINTMENT AS SOLICITOR GENERAL.

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[REDACTED], ATTORNEY, STATES WORKED FOR ANTITRUST OFFICE DURING BORK'S STAY WITH KIRKLAND AND ELLIS, BUT NEVER MET HIM OR WORKED A CASE WITH OR AGAINST HIM. HE ADDED BORK'S GENERAL REPUTATION, BASED ON [REDACTED] CONVERSATION WITH OTHERS, IS

END PAGE SEVEN

PAGE EIGHT

THAT BORK DOES NOT BELIEVE IN THE SHERMAN ACT. HE BELIEVES BORK TO BE "UNFORTUNATE APPOINTMENT" AS SOLICITOR GENERAL BECAUSE SUCH AN ATTITUDE, IF TRUE, WOULD IMPAIR HIS JUDGMENT WHEN SHERMAN ACT CASES COME TO HIS OFFICE WITH THE RECOMMENDATION FROM THE ANTI TRUST DIVISION THAT THEY BE APPEALED.

[] AND [], ATTORNEYS OF LONG STANDING WITH ANTI TRUST DIVISION, BOTH STATED HAVE NEVER MET OR HAD LITIGATION WITH BORK, AND ARE THEREFORE, UNABLE TO EXPRESS AN OPINION REGARDING QUALIFICATIONS FOR A POSITION OF SOLICITOR GENERAL.

OPPOSING COUNSEL;

[] ATTORNEY [], CHICAGO, STATED OPPOSED BORK IN EXTENDED LITIGATION CONCERNING ESTATE OF OTTO YOUNG IN APPROXIMATELY 1960. CASE CONCERNED EXTENSIVE REAL ESTATE AND MONEY HANDLED BY BANK TRUSTEE REPRESENTED BY BORK. CASE LASTED SEVERAL YEARS, AND INVOLVED INTRICATE ESTATE MATTERS. [] STATED BORK VERY ABLE LAWYER, PERSONABLE, COOPERATIVE, ETHICAL AND A DECENT MAN. [] STATED BORK A RELATIVELY CONSERVATIVE REPUBLICAN WHILE [] IS LIBERAL DEMOCRAT. HE RECOMMENDED BORK HIGHLY FOR A POSITION OF SOLICITOR GENERAL.

END PAGE EIGHT

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PAGE NINE

MISCELLANEOUS;

[REDACTED], MIDWEST ANTITRUST OFFICE, CHICAGO, AND PRESENTLY WITH LAW FIRM MAYER, BROWN AND FLATT, 231 S. LA SALLE STREET, CHICAGO, ILLINOIS, STATED RECALLED NO LITIGATION BY BORK WITH ANTITRUST OFFICE. HAS NEVER BEEN IN COURT WITH BORK, NOR WITNESSED HIS LEGAL WORK, HOWEVER, HAS HEARD SPEECHES BY HIM REGARDING ANTITRUST MATTERS BEFORE VARIOUS BAR ASSOCIATIONS, HAS CONVERSED WITH HIM AND READ SOME OF BORK'S WRITINGS. IN HIS OPINION, BORK ADVOCATES A MUCH MORE LIMITED AND RESTRICTED ANTITRUST PROGRAM. HE LISTED FOLLOWING CONCERNING HIS RECOLLECTION OF BORK'S CONTENTIONS:

1) BELIEVES PRICE FIXING SHOULD BE SUBJECT TO RULE OF REASON AND NOT ILLEGAL IF CAN BE SHOWN THAT AGREEMENT DOES NOT AFFECT REASONABLE PRICES.

2) BELIEVES ANTIMERGER CASES WHICH HAVE RESULTED IN STOPPING MERGERS HAVE GONE TO FAR, AND BELIEVES MANY MERGERS SHOULD BE PERMITTED.

3) BELIEVES AGREEMENTS BY COMPANIES ON TERRITORY AND CUSTOMERS SHOULD NOT BE UNLAWFUL PER SE, BUT SHOULD BE SUBJECT TO RULE OF REASON.

[REDACTED] SAID, IN SHORT, BORK BELIEVES PRESENT ENFORCEMENT
END PAGE NINE

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PAGE TEN

OF ANTITRUST LAWS IS NOT IN PUBLIC INTEREST. [] STATED BORK IS MAN OF INTELLIGENCE, SCHOLARSHIP, SINCERITY, INTEGRITY, AND EXCELLENT LAWYER: HOWEVER, HE BELIEVES HIM TO BE OUT-OF-STEP WITH MOST ANTITRUST VIEWS IN GOVERNMENT. HE STATED BORK TO BE PERFECT CHOICE OF DEFENSE LAWYERS FOR POSITION OF SOLICITOR GENERAL, BUT BASED ON ABOVE, HE BELIEVES HIS PRESENT VIEWS ON ANTITRUST TOO EXTREME FOR THE JOB. HE ADDED, HOWEVER, THAT BORK'S VIEW MAY MODERATE IF HE IS APPOINTED.

[], HART, SCHAFFNER AND MARX, 36 S. FRANKLIN, CHICAGO, ILLINOIS, WHO FORMERLY WAS ENGAGED IN ANTITRUST LITIGATION DURING THE PERIOD OF BORK'S STAY IN CHICAGO, STATED HE NEVER WORKED WITH BORK ON A CASE AND HIS ONLY ASSOCIATION WITH HIM HAS BEEN AT BAR MEETINGS. STATED BORK HIGHLY RESPECTED AS LAWYER AND THAT HIS WRITINGS ARE PERCEPTIVE AND ORIGINAL. STATED BORK APPROACHES ANTITRUST PROBLEMS WITH A FRESH VIEW AND IS ABLE TO GET TO THE REAL ISSUES. [] AGREES WITH BORK THAT IN MANY CASES THE LAW IS NOT APPLIED TO PROPER SITUATION. HE BELIEVES HIM TO BE OPEN-MINDED WITH NO PREJUDICES FOR AGAINST BUSINESS AND IS AGAINST ENFORCEMENT OF ANTITRUST LAWS ONLY IN WRONG CASES. RECOMMENDS HIGHLY FOR POSITION OF SOLICITOR GENERAL.

[], ATTORNEY, MAYER, BROWN AND PLATT, REFERRED
END. PAGE TEN

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PAGE ELEVEN

TO ABOVE, ADVISED THAT HE, [REDACTED], FORMERLY WORKED AS AN ATTORNEY IN THE ANTITRUST DIVISION, WASHINGTON, D.C. AND FROM 1941 TO 1954, WAS EMPLOYED BY THE SOLICITOR GENERAL OF THE US. DURING THE LAST FOUR YEARS OF THIS EMPLOYMENT, WAS EITHER FIRST ASSISTANT OR ACTING SOLICITOR GENERAL. [REDACTED] DOES NOT KNOW BORK PERSONALLY, BUT STATED HE IS WELL KNOWN IN ANTITRUST FIELD AS PROFESSOR, WRITER, AND PERSON OF ABILITY. HIS IMPRESSION OF BORK IS THAT HE CONSIDERS US SUPREME COURT TOO SEVERE IN ENFORCING ANTITRUST LAWS. [REDACTED] STATED BORK HAS REPUTATION OF BEING PRO-BUSINESS RATHER THAN PRO GOVERNMENT. HE CONSIDERS WELL QUALIFIED, HOWEVER, FOR POSITION OF SOLICITOR GENERAL AND RECOMMENDS FOR THAT POSITION.

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ATTORNEY [REDACTED], CHICAGO, ILLINOIS, STATED HAS KNOWN BORK FOR 25 YEARS SINCE BOTH ATTENDED U OF C LAW SCHOOL. DURING PERIOD BORK WAS ASSOCIATE WITH KIRKLAND AND ELLIS IN CHICAGO, THEY OFTEN WORKED TOGETHER ON CASES OF MUTUAL INTEREST REPRESENTING CO-DEFENDANTS. SINCE BORK LEFT CHICAGO, CONTACT HAS BEEN SPORATIC. [REDACTED] SAID BORK IS MOST ABLE ATTORNEY AND DECENT HUMAN BEING. HE VOUCHERED FOR HIS CHARACTER, REPUTATION, MORALS AND INTEGRITY. HE KNOWS NOTHING IN BORK'S BACKGROUND OR ASSOCIATIONS WHICH WOULD EMBARRASS HIM AS SOLICITOR GENERAL, AND RECOMMEND HIM HIGHLY FOR THAT POSITION.

END PAGE ELEVEN

PAGE TWELVE

[REDACTED], ATTORNEY AT LAW, [REDACTED], CHICAGO, ADVISED HAS KNOWN BORK ABOUT 13 YEARS PROFESSIONALLY AND SOCIALLY. HE NEVER OPPOSED BORK IN COURTROOM, BUT HAS SEEN HIM IN MANY SITUATIONS INCLUDING LITIGATION AND PROFESSIONAL MEETINGS, AND HAS GREAT RESPECT FOR HIS IDEAS AND JUDGMENT. HE TERMED HIM ONE OF MOST OUTSTANDING LAWYERS IN THE US TODAY. [REDACTED] SPOKE HIGHLY OF BORK'S CHARACTER, REPUTATION, AND ASSOCIATES PLUS HIS PROFESSIONAL ETHICS. HE SAID BORK HAS NEVER REFLECTED ANY RACIAL OR OTHER BIAS AND IS A COMPLETELY FAIR INDIVIDUAL. ALTHOUGH NOT OF THE SAME POLITICAL PARTY AS BORK, HE RESPECTS HIS IDEAS AND BELIEVES BORK'S POLITICAL BELIEFS WILL HAVE NO BEARING ON HIS DUTIES AS SOLICITOR GENERAL. WHEN HE HEARD BORK HAD BEEN NOMINATED FOR POSITION OF SOLICITOR GENERAL HE FELT THE CHOICE WAS "MARVELOUS" AND HE RECOMMENDED HIM HIGHLY.

AFFILIATIONS;

AMERICAN BAR ASSOCIATION (ABA) CHICAGO, ILLINOIS.

BORK IS ABA MEMBER IN GOOD STANDING. NATIONAL CONFERENCE OF BAR EXAMINERS HAS NO GRIEVANCES OR UNFAVORABLE INFORMATION.

[REDACTED], ABA, STATES DOES NOT KNOW BORK.

END PAGE TWELVE

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PAGE THIRTEEN

[REDACTED], DIVISION OF LEGAL PRACTICES AND EDUCATION, ABA, DOES NOT KNOW BORK BUT ADVISED BORK MEMBER OF ABA ANTITRUST SECTION AND MEMBER SECTION'S SHERMAN ACT COMMITTEE SINCE 1969 AND CURRENTLY APPOINTED FOR 1972-1973 YEAR. ALSO MEMBER SECTION'S INTERNATIONAL TRADE COMMITTEE, SUBCOMMITTEE ON EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAWS, FOR YEARS 70 TO 72.

CHICAGO BAR ASSOCIATION (CBA) CHICAGO, ILLINOIS.

MEMBERSHIP AND GRIEVANCE FILES REVEALED NO INFORMATION ON BORK.

CREDIT AND ARREST CHECKS;

NO ADVERSE CREDIT INFORMATION ON BORK. NO ARREST RECORDS LOCATED FOR BORK OR WIFE, CLAIRE.

REPORT FOLLOWS.

END

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Date: 12/18/72

Transmit the following in _____
(Type in plaintext or code)Via AIRTEL _____
(Priority)

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71

TO: ACTING DIRECTOR, FBI
FROM: SAC, WFO (161-8634) (P)

ROBERT HERON BORK
SPECIAL INQUIRY
BUDED: 12/18/72 Without Fail

LEADS: WFO
State Passport
IRS
/

161-9206-31

NOT RECORDED
12 JAN 31 1973

1-Bureau
1-WFO (161-8634)
(2)
RMS:nrc

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Spec Inq

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Approved: _____
Special Agent in Charge

Sent _____ M Per _____

WFO 161-8634

RMS:lsm

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EMPLOYMENT
WHITE HOUSE OFFICE

The following investigation at the White House Office was conducted by SA [REDACTED] on December 14, 1972:

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The files of the Personnel Office, White House Office, contain no record for the appointee, ROBERT HERON BORK.

The files of the Records Office, White House Office, contain the following information concerning the appointee:

November 2, 1972 Commission dated. Member, Board of Trustees, Woodrow Wilson International Center for Scholars, Smithsonian Institution. The term of the Commission expires October 23, 1978.

AMERICAN ENTERPRISE INSTITUTE
1150 17th Street N.W.
Washington, D.C.

On December 14, 1972, [REDACTED], Assistant Treasurer, American Enterprise Institute, advised that she has known the appointee since he began association with the Institute approximately fourteen years ago. She advised that there are no personnel records kept as such for members of the Institute since there are many members, like the appointee, who serve in an advisory capacity and are employed full time in either private enterprise or the academic field. The appointee occasionally travels to the Washington, D.C. area to attend conferences for the Institute and she has had the opportunity to meet with the appointee at those times. She considers the appointee to be a distinguished, accomplished legal mind who is well respected in both the academic and business fields. She considers the appointee's character, loyalty, associates and reputation to be of the highest caliber. She would highly recommend the appointee for a position of trust and confidence with the United States Government.

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On December 14, 1972, [REDACTED]
[REDACTED], American Enterprise Institute, advised that he has known the appointee for approximately ten years as a result of the appointee being associated with the Institute. The appointee is an advisor and consultant for the Institute in matters encompassing the legal field. [REDACTED] considers the appointee to be one of the top legal minds in the country whose opinion is well respected both in and out of the academic profession. He describes the appointee as an articulate, circumspect, resourceful lawyer and legal professor. The appointee's character, loyalty, associates and reputation are above reproach. He would highly recommend the appointee for a position of trust and responsibility with the United States Government.

On December 14, 1972, [REDACTED]
American Enterprise Institute, advised that he has known the appointee for approximately ten years through both being members of the Institute. He considers the appointee to be one of the great legal minds of the country. The appointee is both an excellent legal professor and practicing attorney whose opinion is well respected in the legal profession. The appointee's character, loyalty, associates and reputation are above reproach. He would recommend the appointee for a position with the United States Government.

SMITHSONIAN INSTITUTE
WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS
1000 Jefferson Dr. S.W.
Washington, D.C.

On December 15, 1972, [REDACTED]

[REDACTED] Woodrow Wilson International Center for Scholars, advised SA [REDACTED] that the appointee was appointed as a private member of the Board of Trustees on November 2, 1972 with the term of appointment due to expire in 1978. Since the appointee's appointment he has attended one meeting only and this was an introductory meeting of all the Board members. Other than this brief contact with the appointee, [REDACTED] has no knowledge of the appointee. Due to the fact that the appointee is being considered for the position of Deputy Solicitor General of the United States, he will no longer be eligible to hold membership on the Board of Trustees of the Center. The appointee will, upon his confirmed appointment, submit his resignation as a member of the Board of Trustees.

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On December 15, 1972, [REDACTED]

Woodrow Wilson International Center for Scholars, advised SA [REDACTED] that he has known the appointee only through his appointment to the Board of Trustees of the Center. He advised that the appointee attended only one introductory meeting of the board and did not have an opportunity to get to know any of the other Board members. Due to the fact that the appointee is being considered for the position of Deputy Solicitor General of the United States he will no longer be eligible to serve as a member of the Board of Trustees and his resignation will be accepted upon his appointment to the above mentioned position. He considers the appointee to be one of the best legal scholars in the country and is well respected by other in the legal field. He knows nothing derogatory concerning the appointee's character, loyalty, associates or reputation. He would recommend the appointee for a position of trust and confidence with the United States Government.

WFO 161-8634

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United States Senators

The following investigation was conducted by
SA [] on December 13, 1972:

[] Administrative Assistant to United States Senator, LOWELL P. WEICKER, JR., Connecticut, advised the Senator is unavailable, and he is authorized to speak for him. The Senator does not know the appointee personally, but does know him by reputation as a person of very high integrity, who is highly regarded both personally and professionally. The Senator would recommend the appointee for a position of trust and confidence.

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[] Administrative Assistant to United States Senator, ABRAHAM RIBBICOFF, Connecticut, advised the Senator is unavailable, and he is authorized to speak for him. The appointee is known personally by the Senator. The Senator thinks very highly of the appointee, and he would recommend him for a position of trust and confidence.

WFO 161-8634

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CREDIT AND POLICE AGENCIES

SA [] caused a search to be made of the files of the Credit Bureau, Incorporated, Washington, D.C. and was advised on December 13, 1972, that the files contained no record regarding the appointee.

On December 13, 1972, SC [] searched the files of the United States Park Police and no identifiable record could be found concerning the appointee.

On December 13, 1972, SC [] determined that no record was contained in the Metropolitan Police Department files concerning the appointee. It is to be noted that at all times an indefinite number of unidentified records are out of file and not available for review.

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MISCELLANEOUS

ON December 13, 1972, SC [] caused a search to be made of the files of the House Committee on Internal Security and was advised that no identifiable record was found concerning the appointee.

On December 15, 1972 SC [] caused a search to be made of the files of the Bureau of Personnel Investigations, Civil Service Commission and was advised on that date that no record was found concerning the appointee.

On December 14, 1972 SC [] caused a search to be made of the files of the following organizations concerning bar membership and no record was found for the appointee:

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Committee on Grievances, United States District Court for the District of Columbia(USDCDC).

Lawyers Register, USDCDC.

SUPREME COURT OF THE UNITED STATES.

District of Columbia Bar Association.

Federal Bar Association.

On December 14, 1972, SC [] caused a search to be made of the files of the United States Secret Service, United States Department of the Treasury and was advised that no information was found concerning the appointee.

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE NEW HAVEN	OFFICE OF ORIGIN BUREAU	DATE 12/19/72	INVESTIGATIVE PERIOD 12/12/72 - 12/15/72
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY SA 	TYPED BY amp
		CHARACTER OF CASE SPECIAL INQUIRY	

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ST
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REFERENCES: Bureau teletype, 12/11/72;
 New Haven teletype to Bureau, 12/12/72;
 Bureau teletype, 12/12/72;
 New Haven teletype to Bureau, 12/13/72;
 New Haven airtel to Bureau with enclosures, 12/13/72;
 Chicago nitel to Bureau, 12/13/72;
 New Haven teletype to Bureau and New York, 12/14/72;
 New Haven teletype to Bureau, 12/14/72;
 New Haven airtel to Bureau with enclosures, 12/14/72.

- RUC -

ACCOMPLISHMENTS CLAIMED					☐ NONE	ACQUIT- TALS	CASE HAS BEEN: PENDING OVER ONE YEAR ☐ YES ☐ NO PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☐ NO
CONVIC.	FUG.	FINES	SAVINGS	RECOVERIES			
APPROVED COPIES MADE: 3 - Bureau 1 - New Haven (161-1518)						SPECIAL AGENT IN CHARGE DO NOT WRITE IN SPACES BELOW 161-9206- 32 NOT RECORDED DEC 20 1972 STAMP	
Dissemination Record of Attached Report						Notations	
Agency	one cc Deputy AGS						
Request Recd.	JAN 3 1973						
Date Fwd.	58 FEB 5 1973						
How Fwd.							
By							

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ADMINISTRATIVE:

Appointee currently resides at 142 Huntington St., New Haven, Conn., which is located across the street from the Conn. State Agricultural Station and next to the women's dorms of Albertus Magnus College. Neighborhood investigation is therefore limited.

Copies of newspaper articles and of 3 of appointee's published writings previously forwarded to Bureau in referenced airtels are attached to New Haven copy of report.

B*
COVER PAGE

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to:

Report of: SA [REDACTED]
Date: DECEMBER 19, 1972

Office: NEW HAVEN

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Field Office File #: NH 161-1518

Bureau File #:

Title:
ROBERT HERON BORK

Character: SPECIAL INQUIRY

Synopsis: ROBERT HERON BORK, DOB 3/1/27, currently employed as Professor of Law at Yale Law School. Superiors and colleagues recommend. Residence verified at 142 Huntington St., New Haven, and neighbors familiar with appointee and entire family recommend. References favorable and all recommend. Current address of appointee's parents at 111 Park St., New Haven, verified. Credit check re appointee satisfactory at Litchfield County and New Haven, Conn. Arrest check negative re appointee at Conn. State Police. Arrest check re appointee and relatives at New Haven negative. Bibliography of appointee's writings set forth. Summary of newspaper articles obtained from New Haven Register set forth. Democratic and Republican Party heads recommend. Local representatives of New Haven religious and black communities interviewed favorably. Members of judiciary interviewed and recommend.

- RUC -

DETAILS: ROBERT HERON BORK was interviewed on December 12, 1972, and furnished the following background information:

BIRTH: March 1, 1927, at Pittsburgh, Pennsylvania

EDUCATION: Avon Worth High School (3 years), Ben Avon, Pennsylvania;
Hotchkiss School, Lakeville, Connecticut,
graduated 1944;

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University of Pittsburgh, Summer and Fall semesters, 1944;
University of Chicago, B.A., 1948 with honors;
University of Chicago, J.D., 1953, Phi Beta Kappa, Order of Coif, and Law Review at University of Chicago.

MARITAL STATUS: Married CLAIRE SARAH DAVIDSON, June 15, 1952, at Chicago

EMPLOYMENT: 1953-1954, Research Associate, Law and Economics Project, University of Chicago Law School;
1954-1955, Willkie Owen Farr Gallagher and Walton, Chase Manhattan Plaza, New York City;
1955-1962, Kirkland, Ellis, Hodson, Chaffetz and Masters (now Kirkland and Ellis), Prudential Building, Chicago, Illinois;
1962-present, Yale University Law School.

MILITARY SERVICE: 1945-1946, USMCR, Enlisted Service;
1950-1952, USMCR, Officer.

SOCIAL SECURITY #: 207-18-3675

NEIGHBORHOODS: Prior to attending University of Chicago, Dickson Avenue, Ben Avon, Pennsylvania;
1952 - 51st Street and Woodlawn, Chicago, Illinois;
1953 - 27 Pierrepont Street, Brooklyn, Heights, New York;
1954 - 50th Street, Madison Park Apartment, Chicago, Illinois;
1955-1962 - Corner Washington and Vernon Streets, Glencoe, Illinois;
1962-1963 - Humphrey Street between Orange and Whitney, New Haven, Connecticut;
1963-1968 - 61 Huntington Street;
1968 to present - 142 Huntington Street.

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REFERENCES: ALEXANDER BICKEL, Professor, Yale Law School;
ABRAHAM GOLDSTEIN, Dean, Yale Law School;
RALPH WINTER, Professor, Yale Law School.

ASSOCIATES: WARD BOWMAN, Professor, Yale Law School;
[redacted]
New Haven, Connecticut;
HAMMOND CHAFFETZ, Partner, Kirkland and
Ellis, Prudential Building, Chicago, Illinois.

RELATIVES: HARRY PHILLIP BORK, Father, University
Towers, New Haven, Connecticut;
ELIZABETH MILDRED BORK, Mother, same as above;
No brothers or sisters;
CLAIRE SARAH BORK, Nee Davidson, wife, born
September 16, 1930, 142 Huntington Street,
New Haven, Connecticut;
[redacted]
same as above;
[redacted]
same as above;
[redacted], same
as above.

ARRESTS: 1953, Chicago, Illinois, parking in a bus
stop. Appointee advised he was taken into
custody when he tried to interfere with officers
who were towing away his vehicle. Posted \$20
bond, never went to court.

Appointee advised he is a member of the New Haven Lawn
Club, Mont Peleron Society, American Bar Association,
Illinois Bar Association, American Enterprise Institute,
1150 17th Street, N.W., Washington, D.C.

On December 13, 1972, the appointee recontacted the New
Haven Office and advised additionally that he is a
trustee for the Woodrow Wilson Center for International
Scholars located in the Smithsonian Institute, Washington,
D.C. Appointee is also Director of the Thomas Jefferson
Center Foundation at the University of Virginia, Charlottesville,
Virginia. He added that Professor [redacted] on the
faculty there is familiar with his work.

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EMPLOYMENT

On December 14, 1972, KINGMAN BREWSTER, JR., President of Yale University, advised that he has known the appointee for a number of years and described him as a valued member of Yale's faculty. Regarding BORK's character, BREWSTER stated he was honest, courageous and highly intelligent. BREWSTER stated further that BORK is well known in the Yale community for his scholarly approach, the depth of his research, and his tactfulness and gentlemanly manner. BREWSTER advised that he knew of nothing which might disqualify the appointee for government employment or which would reflect unfavorably upon his character or reputation. He gladly gave BORK his highest endorsement.

[redacted], Secretary, Dean's Office, Yale Law School, advised that the appointee had begun employment at the Law School on July 1, 1962, as an associate professor of law. On July 1, 1965, he was promoted to a position of professor of law. He continues to be employed in good standing and his social security number is 207-18-3675. [redacted] noted that she has had frequent contacts with the appointee in her capacity as Dean's Secretary and advised that BORK is always cheerful and pleasant to deal with and that he is highly respected by other members of the clerical staff at the law school for his considerations and his thoroughness.

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[redacted], Yale Law School, advised that he has been so employed for 2 years and prior to that he had attended Yale Law School for 3 years. He was therefore familiar with the appointee as both an instructor and a colleague. He added that in his capacity as Assistant Dean he has worked frequently with the appointee on various projects. [redacted] advised that BORK's character is above reproach. He stated that BORK is highly regarded by other members of the faculty and is respected for his views and his individuality. He is known as a good scholar and a good teacher. [redacted] noted that the appointee's views regarding certain phases of the law tended to be more

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conservative than those of the majority of the professors of the Yale Law School faculty which is known for its liberalism. [] was referring to BORK's free enterprise approach to government and business. He added, however, that he considers it a further indication of the appointee's ability and intellect that he continues to enjoy a high reputation on the faculty. [] added that he feels the appointee's loyalty is above question and advised that he would gladly recommend him for government employment without reservation.

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EUGENE V. ROSTOW, Sterling Professor of Law and Public Affairs, Yale Law School, advised that he was familiar with BORK's work at both the University of Chicago and in private practice and that as Dean of the Law School in 1962 he had been instrumental in recruiting BORK to Yale. He advised that he knows the appointee personally and is familiar with his family and his business life. He advised that he knows of no derogatory information reflecting on the appointee's character or his qualifications for government employment. [] advised that he would gladly recommend BORK for employment.

LOUIS H. POLLAK, Professor of Law, advised that he has known BORK since 1962 and that from 1965 to 1970 he served as Dean of the Law School and therefore was frequently in contact with the appointee. He described BORK as a top flight professor, a superb lawyer, teacher and colleague. He advised that he knows the appointee's wife and 3 children personally and that they live near each other in New Haven. POLLAK advised that BORK has a sterling character and is a fine person. He added that the appointee is a man of high integrity and is trustworthy. POLLAK advised that BORK was "the best man in the world to argue with". His arguments always are well thought out and intelligently presented. He advised that BORK is highly respected by the members of the faculty and stated that he could furnish no information which would disqualify him for government employment. POLLAK added that he felt BORK was an outstanding person and gladly recommended him.

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MYRES S. McDOUGAL, Sterling Professor of Law, Yale Law School, advised that he has known appointee since 1962 as a fellow colleague. McDOUGAL also described BORK in favorable terms as above, adding that he felt BORK to be an ideal choice for the job as he was a superlative man, a fine lawyer with great wisdom, and that he would bring a well trained mind to the office. He added that BORK is highly and affectionately regarded by the colleagues at the law school and highly recommended him.

JOSEPH W. BISHOP, JR., Ely Professor of Law, Yale Law School, advised that he has known the appointee since 1962 and also furnished a favorable endorsement concluding with his highest recommendation for government employment.

CHARLES L. BLACK, JR., Luce Professor of Jurisprudence, advised that he has known the appointee for over 10 years and that he was one of those faculty members who worked to bring the appointee to Yale. BLACK advised that he knows the appointee's family and children and that he is a close personal friend and colleague. BLACK advised that he has never known a more honest and reliable man. In describing the appointee's politics which he said were often contrary to his own, BLACK stated that the appointee tended to hold to the extreme free enterprise point of view. He said that in arguing their respective positions their discussions have always been reasonable and amiable and that he had great respect for BORK's intellect and that BORK had always taken a scholarly approach. He advised that on no occasion to his knowledge has the appointee's personal beliefs alienated any of his colleagues in any way. He gladly gave BORK his highest recommendation.

HARRY H. WELLINGTON, Professor of Law, Yale Law School, advised that he has known the appointee for over 10 years and for a time as the appointee's next-door neighbor on Huntington Street. He also described the appointee in favorable terms indicating further that BORK had a splendid character, he was principled and honest. He added that BORK enjoyed an excellent reputation among his faculty colleagues and was a very popular teacher. He recommended him for employment.

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NEIGHBORHOOD:

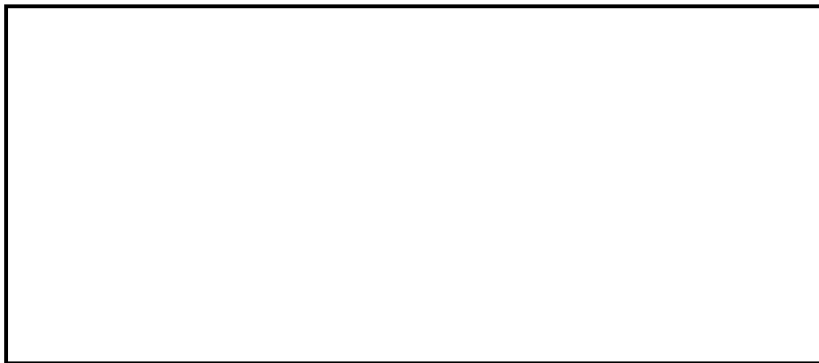
On December 13, 1972, the following individuals were contacted at their residences and without exception advised that they were familiar with ROBERT BORK, his wife CLAIRE, his sons [redacted] and his daughter [redacted]. All indicated that the BORKS were good neighbors, fine friends, and reputable people. None of those interviewed could furnish any information of an unfavorable nature regarding the appointee, his family or his home life and all recommended him for government employment.

61 Huntington Street



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142 Huntington Street



REFERENCES

ALEXANDER M. BICKEL, Professor of Law, Yale Law School, advised that he has known the appointee for 10 years as a colleague and as an intimate friend. He advised that

he also knows the appointee's family and that they belong to the same New Haven Lawn Club. BICKEL had in fact sponsored BORK to this Lawn Club which he described as a tennis and swimming club in Downtown New Haven. BICKEL advised that he believes the appointee's character is unequivocal and that he is honest, trustworthy and honorable. He added that he feels BORK is a strong man and that he regarded him as a very good friend.

BICKEL stated that BORK was active on the faculty and was highly respected as a scholar and instructor. BICKEL noted that to the best of his knowledge, BORK's loyalty is above question. He added that BORK was "still a Marine at heart". BICKEL gladly gave the appointee his absolutely highest recommendation.

ABRAHAM S. GOLDSTEIN, Dean, Yale Law School, advised that he has been Dean of the Law School for over 2½ years and has been on the faculty since 1956. He has known the appointee since 1962 and regards him as a close personal friend. He described BORK as a man of great principle and integrity and advised that he is a highly regarded, vigorous, strong-minded man. He noted that BORK's powerful intellect and well thought and presented arguments were always a part of his views on politics. The Dean noted that BORK has always provided balance in his views of the Yale campus and that he will be sorely missed on the faculty. GOLDSTEIN stated that there is no reason to question BORK's loyalty and noting that he had previously recommended BORK's appointment to the Circuit Court, he gladly gave his highest recommendation.

RALPH K. WINTER, JR., Professor of Law, Yale Law School, advised that he has known BORK since 1962 as a colleague of the Law School. He described him as an excellent instructor and researcher. WINTER advised that he could not state any unfavorable traits in appointee's character. WINTER noted that he and the appointee were close friends and that their families had frequently stayed together on vacations. WINTER noted that BORK was highly respected on the faculty and was well liked by his students. He was unaware

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of any personal criticism against BORK. WINTER added that BORK had been an extremely successful and brilliant practitioner before coming to Yale, and he, WINTER, gave him his highest recommendation.

ASSOCIATES

WARD S. BOWMAN, JR., Professor of Law and Economics, Yale Law School, advised that he has known the appointee since he was a student at the University of Chicago Law School and worked with him when he was employed by the University of Chicago Law School as a research associate. They had in fact worked together on the same general project. He described BORK's work in this capacity as brilliant, thorough and well-researched.

BOWMAN advised that he knows the appointee's family personally and that he was instrumental in bringing BORK to Yale. They have written jointly on several occasions and BOWMAN feels that he knows the appointee better than any other faculty member.

BOWMAN described the appointee as a man of high intellect and strong character. He advised that BORK is a staunch defender of constitutional principles and that he tended to be careful and reasoning in his approach toward legal principles affecting business which have been discussed at Yale. For this reason some have labeled the appointee a "conservative". However, BOWMAN feels this may be a misnomer since the appointee is as liberal in his thinking as any other professor.

BOWMAN stated that BORK has served 2 hitches in the USMC and added that his loyalty is above question. He gladly gave him his highest recommendation.

On December 13, 1972, [redacted], Attorney, [redacted], New Haven, Connecticut, advised that he has known the appointee for 4 or 5 years as a professional associate and a social acquaintance. [redacted] described BORK as "one of the 10 most competent

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lawyers in the U.S." He stated he believes BORK is extremely able as a researcher, as a practitioner, and as an instructor. He stated that BORK is a very deep man with firm convictions. He advised that BORK is a hard worker and a practical man who can put theory to work. [] advised that he has been in court with BORK on several occasions and found him to be very quick and always well prepared.

[] stated that he and BORK have occasionally differed on their political views. [] described himself as a "liberal" and indicated by this he meant that he was a supporter of JOHN KENNEDY and many of the programs associated with that administration. He advised that he has heard the term "conservative" used to describe BORK, however, he feels that as always with such terms it does not begin to actually describe the depth of the man's political convictions. [] elaborated by stating that BORK is a man deeply concerned with the right of the individual person. BORK has great insight into the law and is concerned over the future of the courts. BORK believes in less government control in the business area, however, his feeling for less regulation is one of degree. As a man extremely sensitive to the rights of the individual, [] feels BORK would be a strong supporter in the area of civil rights. He stated that he believes BORK is a true old fashioned conservative in that BORK does not believe in government interference in corporate or individual rights. BORK has expanded his theories into developing new insight into conservative economic theory. [] also stated that BORK has taken a stand that some anti-trust investigations and litigation has been misguided and misdirected. BORK feels that just because a corporation is large it should not be subject to attack by the government and that the greatness and success of a business should not be a criteria for government interference. BORK believes such interference could be of great harm to the U.S. economy.

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According to [], BORK has also written his views regarding the myth which has grown up around the American Court system, that the courts can solve all peoples'

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problems and that the judges are omniscient and omnipotent. This position has received great support locally and nationally from members of the judiciary. [] stated that he is familiar with BORK's wife and family and advised that the appointee leads an exemplary family life. He advised further that BORK is an outgoing and pleasant man who enjoys life, stating that he feels it is "unusual to find a fellow who is a true gentleman, a pleasure to be with, and a superbly competent lawyer". [] added that there is no question that BORK would be an extremely wealthy man if he had stayed in private practice. He advised that BORK has a fine disciplined mind and that he would be a great asset to the federal government.

[] knew of nothing derogatory regarding BORK's loyalty and gladly gave him his highest recommendation.

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RELATIVES

On December 15, 1972, [] Secretary, Madison Towers Apartments, 111 Park Street, New Haven, Connecticut, advised that HARRY P. BORK and ELIZABETH M. BORK, father and mother of the appointee, currently reside in that building.

CREDIT AND ARREST

On December 13, 1972, Patrolman [], New Haven, Connecticut, Police Department, advised after a review of his records that he could locate no record identifiable with ROBERT H. BORK, his wife CLAIRE S. BORK, his children [] or his mother and father ELIZABETH M. BORK and HARRY P. BORK.

On December 13, 1972, [], New Haven Credit Bureau, advised that the records of that institution indicated that there is no adverse information regarding the appointee nor are there any debts outstanding.

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WVG/cbs

[redacted], Clerk, Credit Bureau of Litchfield County, Torrington, Connecticut, which also covers the town of Lakeville, on December 14, 1972, advised records contain no information identifiable with the appointee.

The town of Lakeville maintains no full time law enforcement agency and police protection is provided by the Connecticut State Police.

Trooper [redacted], Canaan Barracks, Connecticut State Police, on December 14, 1972, advised records contain no information pertaining to the appointee.

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MISCELLANEOUS

The following individuals were interviewed on December 13, 1972, regarding the appointee by Special Agent [redacted]

[redacted]:

[redacted], Hartford, Connecticut, advised that although he has never met the appointee, he is known to him by reputation as having a fine legal mind, being an efficient scholar and a reputable man. He would not hesitate to recommend him for government employment.

[redacted], New Haven, Connecticut, advised as above.

[redacted], Hartford, Connecticut, also advised that the appointee is unknown to him, however, he was familiar with his reputation in connection with recent efforts to re-district the State of Connecticut. [redacted] knew of no reason why BORK should not receive government employment.

[redacted], New Haven, Connecticut, advised as above.

United States District Judge M. JOSEPH BLUMENFELD, Hartford, Connecticut, advised he has known the appointee on a professional basis only and feels him to be an intelligent man. Judge BLUMENFELD noted that the appointee had served as a master in efforts to re-apportion the state of Connecticut. He advised that the appointee had done a wonderful piece of work and he thought him to be a man of great industry. He believes the appointee rated only the highest recommendation for this position.

Senior Circuit Court Judge J. JOSEPH SMITH, Second Circuit Court, Hartford, Connecticut, advised that he knows the appointee on a professional basis from his work in the re-apportion case in Connecticut. He knows him to be an able attorney, thorough and intelligent. He noted that the appointee is well thought of in the

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field of constitution law and that he would have no question as to his character and loyalty. SMITH noted that he feels the appointee is so qualified that he had previously recommended him for appointment to the Second Circuit Court of Appeals to follow him in his retirement.

United States District Judge JON O. NEWMAN, Hartford, Connecticut, advised that the appointee has appeared before him in New Haven, Connecticut, in an anti-trust case involving the Penn Central Railroad. He found BORK to be a very knowledgeable person, well versed in the law and an able attorney. Although he has had no other contacts with the appointee, he feels that there is no question as to his character, loyalty, and gladly recommended him.

[redacted] leader in the black community, advised on December 13, 1972, that he has only indirect knowledge of BORK which is based on the friendship of [redacted] and [redacted] who were former classmates at a private preparatory school. [redacted] reiterated that he had no personal knowledge of BORK nor did he possess any information concerning him which he would consider unfavorable.

[redacted], Urban League, New Haven, Connecticut, advised on December 13, 1972, that he is not personally acquainted with BORK but is aware of his status as a professor of law at Yale University. [redacted] related that in the course of his contacts with other legal associates at Yale University, nothing has ever come to his attention concerning BORK which he would consider unfavorable.

[redacted] Circuit Court, State of Connecticut, advised on December 13, 1972, that he has no personal knowledge of BORK and that to the best of his recollection, BORK has never appeared in any of the state's Circuit Courts.

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[redacted] Sixth Circuit Court, New Haven, Connecticut, advised on December 13, 1972, that he has no personal knowledge of BORK.

JOHN REYNOLDS and FRANK J. KINNEY, JR., Circuit Court Judges, State of Connecticut, advised on December 13, 1972, that they are not personally acquainted with BORK and possessed no information concerning him.

PATRICK B. O'SULLIVAN, retired former Chief Justice, currently Connecticut State Referee, Superior Court, advised on December 13, 1972, that he is not personally acquainted with BORK but has heard of him through his legal associates at Yale University. He stated that from comments he had heard, he can only conclude that BORK is very highly regarded by his associates in the community.

HERBERT S. MacDONALD, JUDGE, Superior Court, New Haven, Connecticut, advised on December 13, 1972, that he personally met BORK about 3 or 4 months ago when he, MacDONALD, was invited to a small social gathering for the express purpose of meeting BORK and gaining a personal assessment of him. MacDONALD explained that BORK's name had been proposed for consideration for appointment to the Second Circuit Court, New York. MacDONALD said he was very favorably impressed with BORK's "erudition". He said he has since read some of BORK's writings and has been equally impressed as they have conveyed to him a sense of objectivity and open-mindedness on the part of BORK. MacDONALD added that although his knowledge of BORK was limited based on this one personal contact, he would recommend him for a position with the United States government.

On December 14, 1972, Reverend [redacted] Associate Chaplain, Yale University, advised that the appointee is unknown to him; however, he is familiar with his reputation and stated that the appointee is a highly regarded and well respected

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member of Yale's academic community. He could find no reason to object to the appointee's employment by the United States Government.

On December 14, 1972, WILLIAM SLOANE COFFIN, JR., University Chaplain and Pastor of the Church of Christ, Yale University, advised that he has met the appointee on several occasions and it is his belief that the appointee is a very intelligent man and a thoroughly loyal American. Reverend COFFIN advised that the appointee is highly respected on the Yale Campus for his scholarly ability, both as a lawyer and as an instructor. Reverend COFFIN freely admitted his personal objection to President NIXON and indicated that he felt the appointee would hold similar views as the President. COFFIN advised that his own personal political beliefs have been publicly stated on numerous occasions and he did not feel it was necessary to elaborate on this at this time.

COFFIN terminated the interview by stating that in regard to the appointee's character, loyalty and reputation, he would have no objection to his employment by the United States Government in a position of sensitivity and trust.

On January 5, 1968, WILLIAM SLOANE COFFIN was indicted by a Federal Grand Jury in Boston, Massachusetts, charged with continuing to aid, abet and counsel violations of the Selective Service laws, Title 50, USC, Appendix Section 462a.

On June 14, 1968, COFFIN was found guilty in USDC, Boston, Massachusetts, and on July 11, 1969, U.S. Court of Appeals, First Circuit Court, Boston, Massachusetts, ordered a new trial. On April 15, 1970, United States Attorney, Boston, Massachusetts, declined further prosecution.

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On December 14, 1972, Rabbi ARNOLD JACOB WOLF, Director of the B'nai B'rith Hillel Foundation at Yale, advised that he has seen the appointee on 2 occasions but has never met him personally. He knows of him, however, by reputation and advised that the appointee is widely regarded as an excellent scholar, a loyal American, and he feels that there could be no objection to his appointment to a position of security and trust with the United States Government based on his character or ability. WOLF stated that to the best of his knowledge, the appointee has never been connected with or outspoken on any religious or civil rights issues and, therefore, he did not feel that he could comment regarding BORK's attitudes in this area.

ARNOLD JACOB WOLF, former Rabbi of the Solel Congregation, Highland Park, Illinois, in April, 1962, offered his services as personal advisor on behalf of [REDACTED]

[REDACTED] In March, 1963, WOLF was nominated Vice Chairman of the Chicago Committee to Defend The Bill of Rights (CCDBR) and, in August, 1965, was elected co-chairman of a Committee to Combat Naziism (NCCN). In June, 1966, he was appointed to serve on the Resident Committee of the National Committee to Repeal the McCarron Act (NCRMA).

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On December 15, 1972, [REDACTED], Secretary, Madison Towers Apartment, 111 Park Street, New Haven, Connecticut, advised that HARRY P. BORK and ELIZABETH M. BORK, father and mother of the appointee, reside in that building.

On December 15, 1972, [REDACTED] Recording Secretary, Yale University, retired Special Agent, FBI, advised from his personal knowledge that the New Haven Lawn Club, to which the appointee belongs, has no policy of discrimination as to race or religion and, in fact, noted that it is the policy of this club to recruit members from minority groups.

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[redacted] New Haven Chapter, National Association for the Advancement of Colored People (NAACP), advised on December 12, 1972, that he is not personally acquainted with BORK but has seen him on occasion at local civic functions. He said he possesses no information which would preclude him from recommending BORK for a position with the United States Government.

[redacted], New Haven County, New Haven, Connecticut, advised on December 12, 1972, he has known BORK socially for about 2 years. He said he considers BORK to be a brilliant scholar and possessor of an outstanding legal mind. He has found him to be a fairminded, honest, and completely trustworthy individual whose appointment to a federal government position would be a fine asset to the country.

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On December 13, 1972, [redacted] Connecticut State Bar Association, advised a check of her records reflected that the appointee is not a member of the Connecticut State Bar.

The following items were obtained from the library of the New Haven Register at New Haven, Connecticut, furnished by [redacted]:

On August 19, 1964, the New Haven Register carried an article entitled "Yale Professor in Panel Conferring With Barry". The article, dated-lined Washington, noted that the appointee was among a group of 13 college professors conferring privately with Republican nominee BARRY GOLDWATER about major issues in the campaign ahead.

On May 13, 1965, BORK was one of 3 professors listed as having been named to law school professorship at Yale.

On May 4, 1970, the New Haven Register carried an article entitled "Radical Right Less Dangerous, Professors Call New Left 'Totalitarian'". The article summarized the statements of appointee and RALPH K. WINTER, JR., who spoke on a weekly radio program over Station WTIC in

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Hartford, Connecticut. In this broadcast, the appointee and his colleague take New Left to task for its "willingness to use violence against the majority of society" and its lack of concern with Democratic processes. BORK went on to state that he felt that the free market would be the solution to the problems of the minorities in that they were able to enter into and bid for jobs, etc. He objected therefore to the entrance of government into the free market under which circumstance "bias is enforced through law and is a complete bar."

On March 21, 1972, the Register carried 2 articles both featuring a photograph of appointee, one entitled "Next Try To Be Made By Yale's Prof Bork", the second, "Legislature in Turmoil Over Judges - Bork To Begin Immediately". In summary both articles indicated that the appointee had been named by a 3 judge Federal Panel as a "Special Master" to formulate a new re-districting plan that would conform to constitutional requirements. The former re-districting plan had been struck down earlier that day for having created districts with "highly irregular and bizarre outlines."

On May 11, 1972, under the heading, "Yale Professor Warns", "colleges must shun political leadership". The appointee was quoted as advising that universities which try to assume political leadership, face danger of destroying themselves as centers for research and reason. BORK was described as "lashing out at the New Left for seeming to have a naked desire to smash things and systems for the sheer pleasure of smashing." BORK was quoted from his radio broadcast over WTIC in Hartford, Connecticut.

On December 9, 1972, information regarding BORK's appointment by the President to the position of U.S. Solicitor General was announced in the New Haven Register.

The following is a list of articles written by the appointee as obtained from his bibliography card at Yale Law School Library:

"Antitrust for Australia?-
an evaluation of the American
Experience"

Australian Law Journal
9/30/65

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"Civil Rights - A Challenge"

New Republic 9/21/63
8/31/63

"The Civil Rights Bill"

Chicago Tribune 3/1/64

"Conflicts Between Patent
and Antitrust Laws? -
Comments"

Patent, Trademark, &
Copyright Journal of
Research and Education

1966

"Contrasts in Antitrust
Theory: I"

Columbia Law Review 3/65

"Criminal enforcement of the
antitrust laws: a general
appraisal"

N.Y.S. Bar Associa-
tion Symposium 1963

"The crisis in antitrust"

Fortune 12/63

"Direct controls and the
free market"

Yale Political 6/64

"The goals of antitrust..."

Columbia Law Review 3/65

"The goals of antitrust
policy"

American Economic
Review 5/67

"Legal dimensions of the
decision to intercede in
Cambodia"

American Journal of
International Law 1/71

"Legislative intent and
the policy of the Sherman
Act"

Journal of Law and
Economics 10/66

"The role of reason and
the per se concept: price
fixing and market division"

Yale Law Journal 4/65

"Antitrust in dubious
battle"

Fortune 9/69

"Neutral principles and
some first amendment
problems"

Indiana Law Journal
Fall, 1971

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"Resale price maintenance
and consumer welfare"

Yale Law Journal 4/68

"The Supreme Court vs.
corporate efficiency"

8/67

"We suddenly feel that
law is vulnerable"

Fortune 12/71

"Why I am for Nixon"

New Republic 6/1/68

"The goals of antitrust:
A dialogue on policy"

Columbia Law Review 3/65

"Resale price maintenance
and consumer welfare"

Yale Law Journal 4/68

"Neutral principles and
some first amendment pro-
blems"

Indiana Law Journal

Fall, 1971

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE ALEXANDRIA	OFFICE OF ORIGIN BUREAU	DATE 12/19/72	INVESTIGATIVE PERIOD 12/18/72
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY SA 	TYPED BY 11b
		CHARACTER OF CASE SPECIAL INQUIRY	

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b7C

REFERENCE: Richmond teletype to Bureau, 12/14/72.
Alexandria teletype to Bureau, 12/18/72.

-P-

ADMINISTRATIVE

Three copies of report being designated for the Bureau per Bureau instructions.

LEAD:ALEXANDRIA

AT LANGLEY, VIRGINIA. Will report results of CIA check on BORK as soon as same is made available.

ACCOMPLISHMENTS CLAIMED					☐ NONE	ACQUIT- TALS	CASE HAS BEEN:
CONVIC.	FUG.	FINES	SAVINGS	RECOVERIES			
							PENDING OVER ONE YEAR ☐ YES ☐ NO PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☐ NO

APPROVED <i>CHB</i>	SPECIAL AGENT IN CHARGE	DO NOT WRITE IN SPACES BELOW	
COPIES MADE:		161-9206-	33
③ Bureau		NOT RECORDED	
1- Alexandria (161-1875)		14 DEC 21 1972	

Dissemination Record of Attached Report			
Agency	Date of Deputy AG		
Request Recd.	JAN 3 1973		
Date Fwd.	5 FEB 5 1973		
How Fwd.			
By			

Notations

Spec. Inq.

A*
COVER PAGE

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to:

Report of:

SA [REDACTED]

Office: Alexandria, Virginia

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b7C

Date:

12/19/72

Field Office File #:

161-1875

Bureau File #:

Title:

ROBERT HERON BORK

Character:

SPECIAL INQUIRY

Synopsis:

Honorable G. WARREN NUTTER, Assistant Secretary of Defense for International Security Affairs recommends BORK. No additional pertinent information in the files of the Naval Investigative Service.

-P-

DETAILS:ASSOCIATE

On December 18, 1972, Honorable G. WARREN NUTTER, Assistant Secretary of Defense (International Security Affairs), Pentagon, advised he assumed his position in 1969 and is currently on a leave of absence from the Economics Department of the University of Virginia. About eight years or more ago, he came to know BORK due to their common academic pursuits as both have been and are members of the Mont Pelerin Society (an international society of economists, lawyers and political scientists whose common interest is the preservation of free democratic societies. The organization meets once a year.) From 1966 to 1969, NUTTER was Director of the Thomas Jefferson Center and BORK recently became a member of the board of directors of the Thomas Jefferson Center Foundation. Also, in 1964, BORK and NUTTER worked for the Republican National Committee.

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BORK is a trustworthy, "first rate," very fine person and there is no question on his qualifications as a lawyer. Nothing derogatory is known concerning his character, reputation, morals, or integrity, and there is no shadow of doubt concerning his loyalty to our political system. BORK is recommended for a position of trust and confidence in the United States Government.

NAVAL INVESTIGATIVE SERVICE (NIS) CHECK

SC [] caused a search to be made of the files of the NIS and was advised on December 18, 1972, that the files contained no additional pertinent information concerning BORK.

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FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 19 1972

TELETYPE

Mr. Felt	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. Dalbey	_____
Mr. Gabbard	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, ES.	_____
Mr. Purvis	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Ms. Herwig	_____
Mrs. Neenan	_____

ST 11 013 CG PLAIN
425 PM URGENT 12-19-72 EOM
TO ACTING DIRECTOR
FROM CHICAGO (161-2424) (P) 3P

ROBERT HERON BORK, SPECIAL INQUIRY.

MR. MARTIN
ROOM 1246

RE CHICAGO TELETYPE TO BUREAU DATED DECEMBER 18,
LAST, AND BUREAU PHONE CALL DECEMBER 19, INSTANT.

FOLLOWING INVESTIGATION CONDUCTED ON DECEMBER 19,
INSTANT:

[REDACTED], ATTORNEY, OF LORD, BISSEL,
AND BROOK, 135 SOUTH LA SALLE STREET, CHICAGO, ILLINOIS,
ADVISED HE WAS CHAIRMAN OF SECTION OF ANTITRUST LAW,
AMERICAN BAR ASSOCIATION, (ABA), UNTIL HIS TERM EXPIRED
IN AUGUST, LAST. HIS ASSOCIATION WITH BORK AT ABA WAS
MINIMAL BUT HE KNEW HIM WHEN BORK WAS AFFILIATED WITH
FIRM OF KIRKLAND AND ELLIS, CHICAGO. ON SEVERAL
OCCASIONS, HE AND BORK REPRESENTED MULTIPLE DEFENDANTS
IN TRIPLE DAMAGE ANTITRUST CASES. THESE CASES DID
NOT GO TO TRIAL BUT HE PARTICIPATED IN NEGOTIATIONS
WITH BORK ON THE SAME SIDE.

END PAGE ONE

58 FEB 5 1973

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NOT RECORDED

12 JAN 31 1973

PAGE TWO

[] SAID BORK IS COMPETENT LAWYER WITH FINE MIND WHO, IF APPOINTED SOLICITOR GENERAL, WOULD VIGOROUSLY ENFORCE THE ANTITRUST LAWS ALTHOUGH HE WOULD HAVE HIS OWN APPROACH AS TO WHAT THE ENFORCEMENT WOULD BE. HE AGREES WITH BORK THAT ANTITRUST ENFORCEMENT IS OCCASIONALLY TOO STRONG UNDER CERTAIN SETS OF FACTS ALTHOUGH PATENT VIOLATIONS SHOULD BE FULLY PROSECUTED. HE HIGHLY RECOMMENDED BORK.

[] ATTORNEY, ONE NORTH LA SALLE STREET, CHICAGO, ILLINOIS, SAID THAT ALTHOUGH BOTH HE AND BORK ARE MEMBERS OF THE SHERMAN ACT COMMITTEE OF ABA, HE DOES NOT KNOW HIM THROUGH THE COMMITTEE. HE KNEW BORK THROUGH CASE INVOLVING ALLEGED PRICE FIXING UNDER ANTITRUST LAWS BY U.S. STEEL, BETHLEHEM STEEL AND OTHER STEEL COMPANIES. [] WAS AMONG LAWYERS REPRESENTING NEW YORK AND CHICAGO TRANSIT COMPANIES AND BORK REPRESENTED NEW HAVEN RAILROAD. HE AND BORK REPRESENTED PLAINTIFFS AND WON CASE.

END PAGE TWO

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PAGE THREE .

[REDACTED] CONSIDERS BORK CAPABLE, CONSCIENCIOUS
AND LOYAL AMERICAN. HE SAID BORK IS SOMEWHAT LESS
ENTHUSIASTIC THAN SOME PEOPLE ABOUT ABSOLUTE ENFORCEMENT
OF SHERMAN ACT BUT HE HAS A PROFESSIONAL ATTITUDE AND
WOULD REPRESENT THE GOVERNMENT TO BEST OF ABILITY.
CONSIDERS BORK'S APPOINTMENT AS SOLICITOR GENERAL A
GOOD APPOINTMENT.

REPORT FOLLOWS.

END

HOLD

LRS FBIHQ5 ACK FOR NRS012 013

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FBI

Date: 12/19/72

Transmit the following in _____
(Type in plaintext or code)Via AIRTEL _____
(Priority)

ST
D

TO: ACTING DIRECTOR, FBI

FROM: SAC, NEW YORK (161-4282) (RUC)

SUBJECT: ROBERT HERON BORK
SPECIAL INQUIRY
BUDED: 12/18/72

Re New York nitel dated 12/18/72.

Enclosed are two articles written by appointee published by Fortune Magazine and furnished by [redacted], Fortune, Time and Life Building, Rockefeller Center, New York, New York, on 12/18/72.

[redacted] advised that she did not have a December, 1963 issue of the magazine.

of

1 - Bureau (Encl. 2)
1 - New York

JTO:pml
(3)

ENCLOSURE
ENCLOSURE ATTACHED

161-9206-35
NOT RECORDED

15 DEC 21 1972

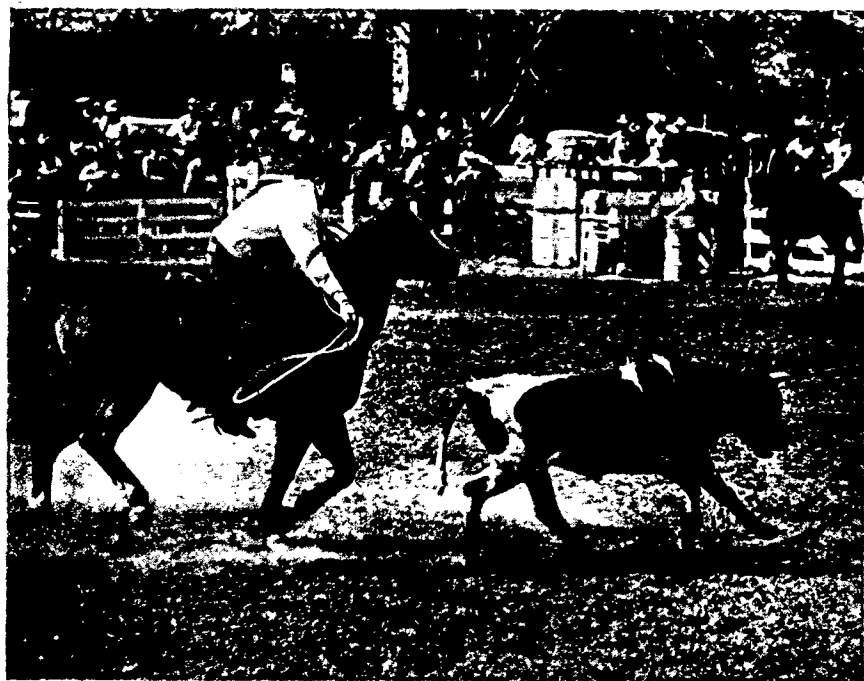
Spec. Inc.

58 FEB 5 1973

Approved: [Signature]
Special Agent in Charge

Sent _____ M Per _____

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Norman Strouse, sixty-two, recently retired as chairman of the board of J. Walter Thompson Co., can now give full time to his second career as a bibliophile. Earlier this year he taught a course in the art and history of the book at the University of California, Santa Cruz, and he is now establishing, largely out of his own collection, a museum at St. Helena, California, devoted to Robert Louis Stevenson. Strouse has also written books on book collecting and operates his own hand printing press. He has reproduced old woodcuts and some favorite passages from his collection of more than five thousand items, including rare books, manuscripts, autographs, and incunabula.





"There has grown up in recent years the pernicious notion that antitrust is some sort of open warrant for prosecutors to roam the business world like knights-errant, deciding for themselves which are the damsels and which the dragons..."

Antitrust in Dubious Battle

by Robert H. Bork

In antitrust policy the Nixon Administration has sprinted away to a fast start in the wrong direction. The Antitrust Division of the Department of Justice appears in danger of not only missing a rare and invaluable opportunity to reform this sadly decayed field, but—if its unreflective assault on conglomerate mergers is a taste of the future—making a bad situation much worse. If it wishes to pursue a course that is responsible and constructive, this Administration had better pause and take serious thought about the proper goals of antitrust and the means by which they can be achieved.

There has grown up in recent years the pernicious notion that antitrust is some sort of open warrant for prosecutors to roam the business world like knights-errant, deciding for themselves, often in defiance of conventional anatomical indicia, which are the damsels and which the dragons. Right now the chief of the Antitrust Division, Richard W. McLaren, seems to think he sees a lot of conglomerate mergers exhaling flames. Before he slays them, it is fair to ask his reasons, since he sometimes sounds as if the antitrust laws were his mandate to pursue every social policy except the prevention of lascivious carriage.

Among other things, he has mentioned that conglomerate acquisitions may be tax-motivated, may involve the issuance of dubious securities, are causing something called a "radical restructuring" of the economy, and result in "human dislocations." Valid or not, these objections have nothing to do with antitrust policy. Take "human dislocations," for example. What precisely, does McLaren have in mind? "When the headquarters of one or two large companies are removed from the nation's smaller cities to New York or Chicago or Los Angeles, I think we all recognize that there is a serious impact upon the community. The loss is felt by its banks, its merchants, its professional and service people—accountants, lawyers, advertising agencies. The community loses some of its best-educated, most energetic and public-spirited citizens.

Professor Bork, a member of the Yale Law School faculty, is a specialist in antitrust law and has written previously for FORTUNE on this subject. He was a dissenting member of the Neal task force appointed by President Johnson to study antitrust policy.

I am concerned that even some of our larger centers may become 'branch house cities,' whose major business affairs are directed by absentee managers. As I have indicated earlier, these are results which contravene the national policy as repeatedly expressed by Congress."

Every lawyer loves a skillful gambit, and attributing to Congress a clear-cut policy it never voted on has always been considered good, clean legal fun, the sort of ink cloud you shoot out when neither the statute nor the facts of the case support your position. But this is going a little too far. McLaren is now more than an advocate: he is a policy-making official.

It is time somebody spoke the magic words "law and order." Members of this Administration must certainly display a positive reaction to that phrase, and law, we surely need not remind them, imposes restraints upon prosecutors and courts quite as much as upon ordinary citizens. The creative flair of the Antitrust Division must be kept within the bounds of the statutes it has been given to enforce. Congress has never, much less "repeatedly," enacted a keep-'em-down-on-the-farm statute that makes the illegality of a merger depend upon its contribution to some interstate brain drain.

It may be admitted that the opinions expressed in the congressional debates on the merger statute, Section 7 of the Clayton Act as amended in 1950, display the same richness of variety as the contents of a fruitcake, so that you can pry a fragment of almost any social policy out of them. But the statute Congress actually voted on calls solely for the preservation of "competition" and the avoidance of "monopoly." It forbids acquisition of one company by another, that is, only where the effect "may be substantially to lessen competition or tend to create a monopoly." With the aid of a little basic economics, you can make a law out of that—taking the terms, as is natural and sensible, to refer to the desirability of efficient use of economic resources in the interest of consumers. But should the Antitrust Division attempt to judge conglomerate mergers by weighing gains in efficiency and competitive vigor (which McLaren admits are relevant) against losses to the certified public accountants of Keokuk, mixing in sociological speculation whether that city or Chicago more urgently needs a particular lot of public-spirited

citizens, the result can only be uninformed, ad hoc political guesswork, not anything remotely recognizable as law.

Such a result would violate not merely the wording of the statute but, more fundamental, the ideal of law. Antitrust is a hybrid policy science, being composed of both law and economics. I use the word "science" deliberately. We are too little accustomed to thinking of law as a science, and indeed in current practice there is little enough to suggest the concept, but it should be obvious that law must develop the characteristics of a policy science if the ideal of the rule of law is even to be approximated. At the center of any science of law must stand a normative model of judicial behavior, which is to say a system of understood constraints upon the values judges may consider in deciding cases and the methods by which they may reason from proper values to the decision of specific controversies. To a large extent that model must be based upon the specialized function of courts as against the explicitly political role of the legislature.

Antitrust, unlike many other fields of law, already possesses the rudiments of such a science, but failure to follow its principles consistently has led to much that is wrong, and even perverse, in current judge-made law. To start with the bright side, the Supreme Court has resolutely refused to judge the legality of pricing agreements by the general "reasonableness" of the prices charged. To do so would have mired the Court, without criteria fit for judicial use, in a grossly political balancing of the interest of consumers in low prices against the interest of producers in high prices. Any such compromise between the conflicting claims of interest groups belongs to the legislature. But the Court in recent years has failed to recognize that it commits the very error it avoided in pricing cases when it undertakes to balance the interest of consumers in increased efficiency against the interest of what the Court calls "viable, small, locally owned businesses." That is what the Supreme Court has done in some merger cases. This case-by-case legislative compromise is not only an improper function for courts applying statutes, but also one at which they are not at all adept. In antitrust, when inconsistent values have been let in, it has been the consumer interest that has gone under. And yet this is the primary value that antitrust's protection of competition is intended to serve.

The first requisite of reform

It hardly needs saying that the same value constraints are relevant to prosecutors. If, for example, a judge is not properly free under amended Section 7 of the Clayton Act to determine the legality of a corporate acquisition according to the dollar worth of the corporation's assets, it is certainly not proper for a prosecutor either to try to persuade the judge to do just that, or to bring actions, motivated by such considerations, that will at the least have harassing effects. That amalgam of muddled thinking, social mythology, and sentimental rhetoric known to its intimates as "the social purposes of antitrust," however sonorously it may ring upon ritual occasions for mock-Jeffersonian oratory, must be excluded from judicial and prosecutorial decisions about actual cases. The first requisite of antitrust reform, therefore, is the identification of and principled adherence to proper goals. *The only legitimate goal of our present statutes is the maximization of consumer welfare.* And that is true, I stress, not because antitrust is economics, but because it must be, first and foremost, deserving of the name of law.

Businessmen can seek profits in two quite different ways that impinge upon consumer welfare. One is the method of monopoly—gaining market control in order to increase net return by restraining output and raising prices. Monopoly misallocates resources with the result that the economy as a whole produces less than it otherwise could, a clear disservice to consumers. The other and altogether different method is the creation of efficiency—by cutting costs, opening new markets, offering new or modified products and services, or in other ways vying successfully for consumer dollars. The whole task of a consumer-oriented antitrust policy is to estimate which of these opposing effects predominates in any specific market behavior or structure.

Since neither misallocation of resources nor efficiency can be directly measured, there is absolutely no merit to the common proposal to decide cases by studying all relevant performance factors. To illustrate, we cannot begin to quantify a claimed future improvement (or decline) in the performance of Jones & Laughlin resulting from its acquisition by Ling-Temco-Vought, because that would require, among other impossibilities, precise statements about differences in quality of future decisions concerning problems that cannot now even be identified.

The Philo Vance approach

Correct analysis employs what has been called, with misplaced sarcasm, "the Philo Vance approach to antitrust." Since courts cannot measure efficiency or misallocation directly, they must rely on probabilities, framing general rules on the basis of economics. Where economic theory tells us that certain business behavior is likely to result in monopoly profits and misallocation of resources, such behavior should be illegal. All other behavior should be lawful so far as antitrust is concerned, since, in relation to consumer welfare, it is either neutral or motivated by considerations of efficiency. A tax-propelled conglomerate merger, for example, is neutral since courts have no means of judging what impact, if any, it will have upon consumer welfare. They should, therefore, leave the situation to the tax laws or to any other statutes Congress may enact. *Efficiency-motivated mergers deserve the law's protection. The market will penalize those that do not in fact create efficiency.*

Economics provides one other lesson that should be written in red letters across every antitrust prosecutor's bathroom mirror: injury to competitors is irrelevant to the question of injury to competition and consumer welfare. Much antitrust argument today seizes upon the fact of competitor injury and treats it as not merely relevant but decisive. The antitrust enforcer, with a massive *non sequitur*, leaps from observed fact to inferred significance as nimbly as did the apocryphal fundamentalist: "Believe in baptism? Why, man, I've seen it done!"

You may see injury to a competitor; you will never see, as raw fact, injury to competition. The presence of the latter can be inferred only on the basis of economic theory. A company's loss of sales—which is all that is ever meant by injury to a competitor—is fully consistent with a gain in efficiency by a rival company. Because antitrust law has confused the fact with the inference, many of its most cherished doctrines strike directly at efficiency as a threat to competition. In such cases, and they are increasing in number, the law itself inflicts upon consumers the kinds of losses that it is intended to prevent.

Unhappily for those of us who make a living out of

antitrust's mysteries, the truth is that the law almost always, regardless of context, uses one of two basic theories of how competition may be injured:

1) Competitors may agree to remove the rivalry existing between themselves; or

2) Competitors may inflict injury on rivals and thereby ultimately injure the competitive process.

Cartels and large horizontal mergers fall within the first theory, which, though it has been drastically over-extended, contains an important core of validity. The second theory—that of supposedly “exclusionary” practices—is the sole support for the present stern rules concerning vertical mergers, tying arrangements, exclusive dealing contracts, and price discrimination, as well as for the developing harsh treatment of conglomerate mergers and reciprocal buying. This large and growing structure of law rests upon an exceedingly flimsy foundation, for in the version used by the law the idea of exclusionary practices as a threat to competition is fallacious.

Add two and zero and get four

The fallacy lies in counting the same thing twice—in this case, the same market power. The nature of the error, which is basic to antitrust's current confusions, can be simply illustrated. Frank Carruthers, let us suppose, owns the only motion-picture theatre in the remote hamlet of Lakeville, Connecticut. Having a monopoly, he drives the price of films down to \$800 while exhibitors in New Haven must pay \$1,000 for a film of equal quality. Carruthers expands by purchasing one of the New Haven theatres, thinks the situation over, and telephones a distributor to announce that he wants better-quality films for his newly acquired theatre in order to gain an advantage over the opposition. “Delighted,” the distributor replies, “I can let you have them for \$1,200 each.”

“You don't understand,” says Carruthers. “I want the better films in New Haven for \$1,000 or I won't show any of your films in Lakeville.”

According to the prevalent antitrust thinking, the distributor has no choice but to say yes to this demand, but I think we may confidently rely upon him to say no. Of course, it is worth something to the distributor not to be excluded from Lakeville. But—and this is the overlooked point—Carruthers has already exacted that something, in the form of the \$200 discount on \$1,000 films. Carruthers cannot eat his cake in Lakeville and have it in New Haven too. In demanding a \$200 discount in Lakeville and a \$200 discount in New Haven, he is demanding that the distributor pay for the same thing twice, pay \$400 for a market advantage worth \$200. It won't work.

Presumably, Carruthers could, if he chose, give up the discount in Lakeville in exchange for a \$200 discount on better films in New Haven, but that would bring him no unfair advantage. Rival exhibitors in New Haven would have to pay \$1,200 for better films, and so would Carruthers—\$1,000 plus the \$200 given up in Lakeville.

Under one guise or another, the fallacy of counting the same market power twice pervades antitrust law. It turns up, for example, in the precedent-making suit that the Antitrust Division filed against I.B.M. in the closing days of the Johnson Administration. The charge, laid under Section 2 of the Sherman Act, is monopolization. I.B.M.'s share of industry revenues has varied, according to the complaint, from about 69 to 80 percent in recent years. These figures suggest superior efficiency, but the complaint attempts to avoid this natural inference by alleging

that I.B.M. denied its rivals the opportunity to compete.

I.B.M. did this, it is alleged, through such devices as quoting a single price for computers and software. But since I.B.M. can charge all its computer is worth in the price of the computer, it cannot get more than the combined worth of computer and software by selling them together, any more than Carruthers could get more than the combined worth of his positions in Lakeville and New Haven by negotiating for them together. Does the selling of computer and software together improperly inhibit the ability of rival computer makers to compete? Of course not. If they can compete with I.B.M. in computers, they can either produce the necessary software themselves or find other companies that can. Then the customer can choose the package he likes best. To assume that competitive software is not available to I.B.M.'s rivals is to assume that I.B.M.'s market strength lies not in computers but in software, and, therefore, that the government has the case backward. Chances are I.B.M.'s single-price package was a convenience or contributed to the total service the company sold, in either case a form of efficiency—which does, to be sure, make life harder for rivals. But it is impossible to see the practice as a means of improperly preventing competition, and with that idea out of the way, the government's suit stands revealed as an attack on outstanding commercial success as such.

Although numerous economists point to the double counting of market power as an obvious error, antitrust prosecutors continue to assert, in one context after another, the equivalent of the proposition that a seller can add \$200 and zero and get \$400. Clearly, this peculiar form of new math is wrong—the questioned behavior has other motivations and other effects. Since double counting forms the mainspring of antitrust reasoning about exclusionary effects, a large body of antitrust doctrine, including the existing and emerging rules against vertical and conglomerate mergers, must be considered to stand unjustified.

Conglomerate mergers—phantom threat

The Nixon Administration's announced determination to wage war on conglomerate mergers—with special but by no means exclusive attention to the acquisitions of the top 200 manufacturing companies—must rank as one of the bleakest, most disappointing developments in antitrust history. An Administration that could have initiated pro-consumer reforms has chosen instead to accentuate and extend some of antitrust's most irrational economic theories. The campaign against conglomerate mergers is launched in the teeth of the conclusion reached by the task force that President Nixon himself appointed to study and report on antitrust policy. The task force, headed by George J. Stigler, professor of economics at the University of Chicago, said of conglomerate mergers: “Vigorous action on the basis of our present knowledge is not defensible.” It most certainly isn't. And yet since the submission of that report we have had not only announcements that vigorous action is to come, but also the filing of suits against L-T-V's acquisition of Jones & Laughlin, I.T.T.'s acquisition of Canteen Corp., and Northwest Industries' attempt to purchase effective control of Goodrich.

If McLaren succeeds in sustaining the theories of these cases in court—and in recent years the Antitrust Division has been able to get almost any theory upheld in the Supreme Court—he may have succeeded in destroying the last vestiges of rationality in the antitrust laws. If conglomerate mergers can be held a threat to competition,

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THE BIG BOONDOGGLE AT LORDSTOWN

When General Motors embarked on a whirlwind expansion program to produce a new car, the Ohio construction industry was sucked into a dizzy bout of inflation.

by Don Sider

The explosive inflationary pressures generated by labor conditions in the \$90-billion construction industry pose a dramatic threat to the national economy. In the past year, construction costs have increased by 9 percent. Most of the wage settlements won by the building-trades unions in the first six months of 1969 call for annual wage increases of between 15 and 22 percent. These contracts, totally unrelated to productivity, reflect the unchallenged power of the building-trades unions at the bargaining table. (See "The Unchecked Power of the Building Trades," *FORTUNE*, December, 1968.) And that alarming spiral will continue. A Ford Motor Co. executive has warned his colleagues that they can expect plant-construction costs to increase by 53 percent over the next five years.

The sharp impact of wage-price developments in construction is spreading throughout the rest of the economy. As costs rise elsewhere, industrial unions are using settlements in the construction industry as their initial demands at the bargaining table. Gradually, housing, if not subsidized, is being priced out of the reach of a large section of the population. Essential public services, such as hospitals and transportation, are being delayed or abandoned because of the unconscionable rise in labor costs. This unchecked inflation presents the business community with what is probably its most serious and urgent problem. Some industrialists are groping for a way to put a stop to it. But most of them, while admitting the existence of the crisis, contribute directly to it by rationalizing the toll of construction costs as "one shot" expenditures essential to the conduct of their normal businesses.

A case in point is the decision by General Motors to

build a \$75-million plant in Lordstown, Ohio. In the fall of 1968 the company announced plans to build a new car, the XP 887, that would compete in price and performance with the most popular imports. Since G.M. was faced with steadily increasing labor and material costs, the design and location of the new plant were of paramount importance. Moreover, in order to keep the costs of the compact to a minimum, G.M. wanted a new plant so that it could introduce the most sophisticated automated assembly techniques with a minimum of interference.

After a comprehensive study, G.M. decided to locate a 2,300,000-square-foot stamping plant at Lordstown, Ohio, next to an assembly plant that was turning out Chevrolets. The new stamping plant will produce the small-car bodies, and the existing assembly lines will be converted for the production of the XP 887, which is expected to be on the market by mid-1970. At the same time, G.M. is building a 700,000-square-foot assembly plant for the Chevrolet truck division.

Of G.M.'s 110 building projects, completion of the Lordstown plant is being given top priority. Days after Chairman James Roche announced that the XP 887 was on the planning boards, engineers were surveying the wooded 1,100-acre site in the rolling farmland of the Mahoning Valley. With frantic haste, contractors began to assemble a labor force. Says Frank Riley, G.M.'s vice president of manufacturing, "When we get the first press in there and get the die in, we'll make our first stamping. And no matter when it is, some people here will think it's too late."

The crash program at Lordstown has led General Motors to accept with equanimity skyrocketing overtime and boondoggling work practices that it would consider intolerable in any Fisher-body plant. Yet, with its gaping press pits empty and most of the floor space still open to the sky, the plant at mid-August was six weeks behind schedule. In the first nine months of construction, workers earned over \$2 million in overtime. Eighteen regular days of production were lost because of seven wildcat strikes. A contractor has sued the unions involved for over \$190,000 in damages. And the construction industry in northern Ohio is suffering a severe manpower shortage and spiraling costs as a result of G.M.'s urgency.

Lawsuits and logrolling

When construction workers heard about the big new rush job in northern Ohio, they flocked from as far away as California and Louisiana to try to get in on what they knew would be easy pickings. In November heavy-equipment operators were working up to seventy hours per week—known in the trade as "seven tens." At one time or another since then, most of the crafts have worked a seventy-hour week. The overtime pay varied as the project progressed—most trades were working sixty hours in March; in June they worked an average of fifty-three hours. Consider the weekly wages at the seventy-hour pace: \$563.50 for a laborer, \$661 for a carpenter, and \$666.50 for an operating engineer.

G.M. officials refuse to say how much total overtime was built into the critical-path program, but agreements signed with individual subcontractors indicate that forty-eight-hour and fifty-four-hour weeks will be usual through February, when the bulk of construction is to be completed. The critical path for the stamping plant—with installation of the first pilot line of presses scheduled for December 1 and production by May 1—was created

Nothing personal, Santa. But we're trying to do away with chimneys.

America's utilities want to make smokestacks and smoke a thing of the past. General Electric nuclear power will help.

C'mon now, Santa. You'd figure out how to make your Christmas deliveries, even if there weren't a single chimney in America.

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In the 1960's the nation's utilities produced twice as much electricity as in the 50's.

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Nuclear power is playing a more and more important part in this move.

It was only twelve years ago that the first nuclear power plant was built by General Electric.

Yet today there are 44 GE nuclear plants built or being built for utilities.

Because not only is nuclear power an efficient way to make electricity... it is also an economical way. And a clean way.

So it makes all-electric living not only likely, but also very worthwhile.

Think of what that would do for the air-pollution problem. Electric heating without smoking chimneys. Electric mass transit without fumes.

Maybe even electric cars without exhausts.

Now that's a clean, clear bit of progress worth going out of your way for—eh, Santa?

Progress is our most important product

GENERAL  ELECTRIC

Antitrust in Dubious Battle *continued*

an antitrust attack upon conglomerate mergers raise a variety of debaters' points that can, I believe, be characterized as essentially frivolous. The most commonly urged points against conglomerate mergers are that they increase a general concentration of ownership in the American economy, raise the possibility of reciprocal buying, and create—dread phrase—"barriers to entry." The first of these points is, at its strongest, irrelevant; the second describes a practice that is either harmless or beneficial; and the third raises a specter that is just that, an incorporeal apparition.

A prophecy that never ceases to frighten

The imminent concentration of all ownership in a few giant corporations, with the accompanying demise of sturdy, locally owned small business, is the standard, Mark I, all-weather antitrust hobgoblin. It serves not only against conglomerate mergers, of course, but against any merger involving a very large company, even where the acquired company is far from large. This congealing of the economy has been prophesied freely at least since 1890 on the basis of perceived trends, and it never happens. It also never ceases to frighten people. The evil of the predicted economy-wide concentration is supposed to be both so self-evident and so enormous that counter-argument is overwhelmed. Nothing about the prediction is self-evident, not the statistics, the correctness of the extrapolation, or the assumed sociological, political, or economic consequences.

These all deserve examination, but the point to be emphasized here is that the superconcentration issue, whether genuine or synthetic in other aspects, is a *bogus antitrust issue*. It has no proper place whatever in enforcement decisions under the present statutes, because it is irrelevant to competition in particular markets and to the allocation of resources by the market mechanism. Consistent with the consumer-welfare standard, it is *market* concentration, not economy-wide concentration, that is the subject of the Clayton Act's provisions concerning "competition" and "monopoly." Congress could write a statute about the sociological implications of economy-wide concentration achieved through mergers—a statute that would perhaps be phrased in terms of the size of merging companies' assets. But Congress has not done so. If superconcentration is a matter of concern, Administration officials should appear before the appropriate congressional committees to ask for a political decision, expressed in the form of a statute, on how superconcentration should be dealt with, and how much economic benefit we are willing to sacrifice in the process.

Another hobgoblin is reciprocity, the business practice of buying from those who buy from you. Though it has probably been going on since men traded arrowheads for mammoth hides, it has only recently been discovered to be anti-competitive. The discovery comes at an opportune time for the anti-conglomerate campaign—the more diversified a firm becomes, the more likely that somewhere in its complex dealing it will find the chance to practice reciprocity. Attorney General John N. Mitchell has indicated that the potential for reciprocity will be a key argument in the attack on conglomerate mergers. He characterized the practice as "one of the most easily understandable dangers posed by the conglomerate merger."

On the contrary, in economic terms the "danger" is not understandable at all, much less easily. As the Stigler task force reported, the "economic threat to competition from

reciprocity (reciprocal buying arrangements) is either small or nonexistent." The objection to reciprocity involves the Carruthers fallacy—counting a quantity of market power more than once. If a company is using its position as an important customer to bargain the best possible prices from its suppliers, then that company has no market power left to force the suppliers to buy from it on noncompetitive terms.

The rhetoric of "barriers to entry" is the latest conceptual fig leaf used by the enforcement agencies to hide the obtrusive fact of life that commercial success is usually due to superior efficiency. So far this rhetoric, too, has been highly successful. It persuaded the Supreme Court to strike down Procter & Gamble's acquisition of Clorox on the theory that any addition to Clorox's effectiveness in the market for household liquid bleach would raise barriers to entry. (See "The Supreme Court versus Corporate Efficiency," *FORTUNE*, August, 1967.) In the long course of that litigation, nobody—not the FTC, the Antitrust Division, the Solicitor General, or the Court—ever explained even once how a "barrier to entry" differed from superior efficiency.

The case centered on the "barrier" that would be created if Clorox shared in the quantity discounts that Procter was supposed to receive from the television networks. Nobody ever showed why the ability to get such discounts should not be considered an efficiency. And now, most humiliating development of all, it begins to appear from the separate researches of David Blank, a vice president of C.B.S., and John L. Peterman, a professor at the University of Chicago law school, that the crucial quantity discounts may have suffered from the even more serious defect of not existing. This whole episode has an air of satire: a major merger was dissolved, an unsound concept was embedded in the law, and a vital precedent was established—all on the application of an erroneous theory to an apparently nonexistent "fact."

The only way a company can make entry more difficult through a conglomerate acquisition is by increasing efficiency, and that is beneficial. But if the Antitrust Division succeeds in inhibiting conglomerate mergers with these theories, it will have erected real, and truly anticompetitive, barriers to entry. A successful legal attack would deny us the benefits these mergers can confer: revitalizing sluggish companies and industries; improving management efficiency, either through replacement of mediocre executives or reinforcement of good ones with aids such as superior data retrieval or more effective financial-control systems; transferring technical and marketing know-how across traditional industry lines; meshing research or distribution; increasing ability to ride out fluctuations; adding needed capital; and providing owner-managers of successful small companies with a market for selling the enterprises they have created, thus encouraging other men to go into businesses of their own.

Mistaking horizontal for vertical

The same sort of confusion that characterizes antitrust arguments against conglomerate mergers also shows up in arguments against vertical mergers. A vertical merger, of course, is one in which the acquired company is, actually or potentially, a customer or supplier of the acquiring company. The courts, at the urging of the Antitrust Division, treat vertical mergers with a ferocity wholly unjustified by economic analysis. The law supposes that a manufacturer, M, with 5 percent of a market, can "foreclose" his rivals and "lever" himself to a competitively unjustified market share by acquiring a retailer, R, who has 1 percent of the market and has been selling other manufacturers' products. This is the Carruthers double-counting fallacy again. The

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American industry can no longer be an asylum for illiterates.

Over 8,000,000 American workers have the reading, writing and counting ability of a 4th Grader.

In other words, 10% of our labor force is functionally illiterate.

Until recently, there was a place for the illiterate in industry. But now, technology is threatening to evict them, if possible.

The problem is, they can't be retrained. Because they can't read the most elementary instructions.

And this is what we're dealing with at Olin.

Together with the Board of Fundamental Education, we instituted a literacy program—and then a High School program—in three of our plants, using company space and funds.

Despite initial obstacles (principally older men who didn't want to admit they were illiterate), we graduated our first classes several years ago.

And so far, the results have been so promising that we've broadened the program to include sev-

eral of our other plants as well.

Nearly 200 workers have completed the course. And, in two of the programs, nearly 100 attained their High School diplomas, with a few going on to college.

In just about every case their work efficiency improved dramatically.

But more important was a complete shift in morale. Because these were men who had given up every hope of advancement, proving that they *could* advance.

And these were men capable of growing with our company.

We're not the only corporation to start this program, of course, but we're still one of a small minority—too small to educate the millions who will soon have no place in our technological society.

It's time for every company to start recognizing the problem. And solving it.

There's no growth potential in ignorance.

Olin

Antitrust in Dubious Battle *continued*

theory assumes that R can both enjoy whatever market position it had established and simultaneously transfer its enjoyment to M. It is assumed, in other words, that by forcing its goods on R, M picks up an additional 1 percent of the market in manufacturing, while R keeps its 1 percent in retailing.

But whatever considerations of price, quality, consumer preference, etc., had previously persuaded R not to specialize in M's goods are still operative. If M's goods are forced on R, then the retailer loses the profits that the manufacturer gains. The law's theory of foreclosure, then, turns out to be mistaken. The only sensible explanation for the vertical merger of M and R is that through economies in distribution, management, and the like, it creates profitable efficiencies, which are socially beneficial.

Apologists for tough rules against such mergers (joining manufacturers and merchants in the same line of goods) usually prefer to argue an extreme case. Suppose M should buy 100 percent of the retailers, they say; that surely confers the ability to gain a manufacturing monopoly. As an objection to vertical merger, this argument is spurious—the case as stated is horizontal, not vertical. The problem in such a situation is not the foreclosure of rival manufacturers but the elimination of rivalry at the retail level. To be clear about that, ask yourself whether the situation would be any better if, instead of M, a complete stranger to the industry had bought all the retailers. The answer, clearly, is no: in either case a horizontal monopoly has been created at the retail level.

What I am suggesting is that vertical mergers should be judged by horizontal-merger standards. Thus any acquisition by a manufacturer of a single retail firm should be lawful, because it does not increase market power at the retail level. If the manufacturer acquires two or more retailing companies, horizontal merger standards should be applied to the share created in retailing. I am further suggesting that a manufacturer's acquisition of retailers in the same line of goods should be judged by the same standards as would apply to their acquisition by a newcomer to the industry.

Avoiding both kinds of misallocation

Size or market concentration created by horizontal merger (merger between actual or probable rivals) is a completely different animal from size achieved by internal growth or by conglomerate or vertical merger. Growth demonstrates superior efficiency; horizontal merger to a very large market share does not—it may have been motivated primarily or even solely by a desire to reap monopoly profits. Conglomerate and vertical mergers cannot create the ability to increase profits with restricted output; large horizontal mergers can. On the other side, however, monopoly profit cannot be the motivation for horizontal mergers that add up to only a small share of a market.

To take a clear case: when companies each having 1 percent of a fragmented industry merge, they cannot be supposed to have monopoly profit in mind. As in the case of conglomerate and vertical mergers, their motivation must be either increased efficiency or some effect irrelevant to antitrust. It is, therefore, intelligible policy to set limits on market shares achievable by horizontal merger, but the limits must not be so narrow that their predominant effect is to ban mergers motivated by valid business considerations. Error in either direction will be costly. Allowing horizontal

mergers that are too large invites resource misallocation through deliberate restriction of output. Allowing only horizontal mergers that are very small enforces resource misallocation through lowered efficiency.

We are dealing with a spectrum, and it must be confessed that the proper place to cut it is not at all clear. Unfortunately, our guidelines are few and uncertain. But rough observations are enough, I think, to indicate that present law about horizontal mergers is far too harsh.

A concession to a phobia

The purpose of limiting horizontal mergers to market shares far smaller than those that would be required for monopoly profits is to guard against "oligopolistic" erosion of competition, i.e., the possibility that a few dominant companies may restrict output through noncollusive mutual restraint. (The term "noncollusive" is essential here, for collusive restraint of competition is illegal *per se*.) In a concentrated industry, according to some theories of how oligopolies work, it is possible for supposed rivals to soften rivalry through "conscious parallelism." By following an industry leader, or by acting in accordance with what they know of each other's policies, it is said, these companies move in lockstep in matters of production levels and pricing without actually communicating with each other.

But even if one assumes this picture to be accurate for some industries, that still does not justify the stringency of the present rules on horizontal mergers. Judging from such indications as the eagerness of oligopolists to engage in actual collusion despite the considerable legal dangers, the frequency with which even elaborately negotiated and policed collusive schemes break down under the temptations and pressures of the marketplace, and the dramatic drop in prices that often occurs when even a two-company situation replaces a one-company situation, I would estimate that noncollusive restriction of output is usually not a serious problem where there are as many as three substantial companies in a particular market. (I am not asserting that it is necessarily a serious problem where there are only two.)

As a tactical concession to current oligopoly phobia, I am willing to weaken the conclusion that should follow from that and propose a rule permitting horizontal mergers up to market shares that would allow for other mergers of similar size and still leave *four* significant companies in the market. In a fragmented market, this would indicate a maximum share attainable by merger of about 30 percent. In a market where one company already has more than 30 percent, the maximum would be scaled down somewhat. For example, where one company has 50 percent, no other company could go above about 20 percent by merger (barring some exceptional case, such as the imminent failure of one of the merger partners).

I do not claim that such a rule, or any other I might devise, would either completely prevent noncollusive restriction of output or completely avoid needless destruction of efficiencies. Some such welfare losses are inevitable in any policy that can be framed with respect to horizontal mergers. But I am reasonably confident that this rule, whatever its imperfections, would strike a much better balance between the factors impinging upon consumer welfare than the present judge-made proscription of horizontal mergers creating market shares as small as 5 percent. The harmful effects of that rule upon consumers may be imagined if one realizes it is equivalent to saying that when there are a hundred lawyers in a town no law firm may contain as many as five. Such a rule obviously cuts far too deep into the efficiencies of integration.

The rules on mergers, it should be clear, urgently require reform. And the need for antitrust reform extends beyond merger rules, to fields it has not been possible to discuss here. To put the matter bluntly, we have now reached a stage where the antitrust laws, as they are being interpreted and applied, are simply not intellectually respectable. They are not respectable as law or as economics, and, because they proceed to stifle competition while pretending to protect it, they are not even respectable politics.

The missing discussion

Most of the rules that should be changed were made over the years by the Supreme Court, usually at the urging of the Antitrust Division, and reform can quite legitimately come in the same way. The antitrust statutes lay down very little hard law. The courts remain free to change the subsidiary rules they constructed, and the head of the Antitrust Division should play a key role in that process.

Reform should have an ideal in view, and an ideal consumer-oriented law would, for the most part, strike at large horizontal mergers and at cartel agreements among competitors. I agree with the recommendation of the Stigler task force that more resources and ingenuity should be devoted to a drive against price-fixing and market-division cartels, since there appear to be many that enforcement of the law does not now reach. An enforcement drive against collusion in national, regional, and local markets would pay high dividends in consumer welfare, particularly since cartels, being subject to a rule of per se illegality, are among the least difficult and least expensive offenses to prosecute.

Beyond the reformation of existing antitrust law there is

a broader and potentially far more important role that lies waiting to be seized by a bold and creative antitrust administration. The original antitrust philosophy of open markets and free competition that underlies the rule against cartels should be steadily expanded to cover other fields of economic behavior where control of entry, price fixing, and similar eliminations of competition now occur *with governmental blessing*. The Antitrust Division should make itself the spokesman for antitrust ideals throughout the economy, by testifying on proposed legislation, by intervening in federal and state regulatory processes, and by other means. The opportunities are innumerable—in the regulation of trucking, banking, communications, drug retailing, and in many other fields where regulation often acts less to protect consumers than to preserve business fiefdoms from competitive challenge. A positive antitrust program such as this would elicit enough outraged screams from protected companies to dispel any notion that the policy is narrowly “pro-business.”

Some readers may suppose that the views I have expressed here are extreme. They are not. Far from being personal or idiosyncratic, they represent, in their general outline, a broad and growing school of thought about antitrust policy. Views in many respects quite similar to mine are presented, for example, in the Stigler report, which the Administration has so far assiduously ignored. Reform is a necessity, and, regardless of his own views, Richard McLaren could contribute greatly by using his office to start and focus a systematic discussion of antitrust goals and economics. Without reappraisal and reform, antitrust is likely to go on fighting—and, worse, winning—ever more dubious battles. END

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BRINGING THE LASER DOWN TO EARTH *continued from page 129*

integrated circuits. They also came to realize that the development of lasers for commercial uses would take a lot of R. and D. money.

Since the company didn't want to depend on government contracts, it had to finance research with its own funds. Such projects, out on the frontiers of technology, tended to consume enormous amounts of money. Besides, Bob Rempel was a technical enthusiast who cared more about mastering a great challenge than he cared about how much it would cost.

An informal, longish-haired man who spurns a tie during working hours and likes to put his feet on his desk, Rempel concentrated on product development, leaving finance and marketing to Herb Dwight, the executive vice president, and others. Rempel was, and is, a tireless man. "Anything he took up," recalls an associate, "he took up with reckless abandon." Rempel's idea of swimming, for instance, is to swim a quarter of a mile out into the chilly Pacific and back. When he skis, he picks the most difficult hill. His idea of back-packing is hiking about forty miles in two days, a difficult feat in the mountains. Although he appears somewhat diffident, at parties after a few drinks Rempel has been known to jump on a motorcycle and roar up and down the street.

Rempel spent most of his waking hours in a tiny office that he shared with others, head bent over a drawing board, working from 10:00 A.M. or noon until as late as four o'clock in the morning. When he had made up his mind about something, he was often unyielding. "I'll listen to anybody," he would say, "but I'll do as I please." He liked to re-engineer devices other people had designed. Naturally, the independent-minded engineers reacted "like a bear mother when you start fussing around with her cubs," as one says. At the same time, Rempel could infect people with his enthusiasms. "He's like the Pied Piper," says Dwight.

Measuring to the inch in fifteen miles

Rempel's main contribution to Spectra-Physics was as an inventive and creative mechanical engineer with a knack for converting breadboard models into salable new instruments. One day in 1963 he sat down with Ken Ruddock to start work on a distance-measuring and terrain-profiling instrument that utilized the laser. This project involved Rempel for about three years. It consumed \$750,000 in development costs, including some \$200,000 contributed by Aero Service Corp., now a subsidiary of Litton Industries, in return for a limited royalty. But when Spectra-Physics finally came out with its Geodolite, it offered an instrument that measures distances to an accuracy of one inch in fifteen miles—a degree of precision that cannot be attained with radar or any other device. Although the Geodolite at \$49,500 is the company's highest-priced product, Spectra-Physics has been selling it successfully. The instrument can be operated both on the ground and aloft, and lately oil companies have been using it to profile ice floes off Alaska, near the new oil fields. The Navy has been using it to measure the height of ocean waves. The laser beam hits the target, and the portion of the light that returns triggers an automatic readout in feet.

For all his preoccupation with technology (sometimes he didn't open his mail for weeks), Rempel wasn't completely blind to making money on Spectra-Physics products. One day an engineer who had developed a laser-beam modulator met with Dwight to set the price on the new device. Dwight diligently went into a long series of detailed calculations and

arrived at a price of \$980. Rempel, who had overheard snatches of the conversation, stepped into the office, picked up the modulator, and said: "Oh, that looks pretty nice. Let's sell it for \$2,250." They did, very successfully.

Despite his creativity and energy, Rempel had a flaw: he worked on projects that fascinated him, to the exclusion of nearly all other company problems. He felt, with some justification then, that customers really didn't know what they wanted in the way of instruments that incorporated the laser. His approach was to try to build the best possible technical device and then sell it on the strength of its superiority.

His biggest such effort, which eventually contributed to his departure from Spectra-Physics, involved the development of a step-and-repeat masking camera, which he hoped could be used in making integrated circuits. The project began in 1964, when Spectra-Physics acquired Zissen Technical Associates of Santa Clara, California. That small company had an effort under way to produce a rather simple apparatus, incorporating a laser, to be used in the manufacture of integrated circuits. Other Spectra-Physics executives were impressed and thought they could complete the device in six months to a year and then sell it for \$25,000 to \$50,000.

Bob Rempel had other ideas. In the beginning, acting as project manager on the masking camera, he added the most advanced optics to it and strove for precision in making photomasks—used in etching integrated circuits—that no one had ever attained. The masking camera, in Rempel's words, became "the most challenging project technically that I could imagine." The other Spectra-Physics founders saw the camera as a means of getting into the area of precision metrology, or distance measurement, with the laser. But the camera began to devour research funds at a fantastic rate, consuming almost a million dollars in two and a half years. After Spectra-Physics finally abandoned the project two years ago, it sold the unfinished masking camera to Hewlett-Packard, for what Dwight calls "a nominal sum." Hewlett-Packard is now readying the camera for use in its own production of integrated circuits.

With so much of its R. and D. money concentrated on the masking camera, Spectra-Physics neglected some important new laser areas. Earl Bell, Spectra-Physics' self-taught technical genius, had discovered that ionized atoms of mercury vapor—atoms with electrons stripped from their outer shell by an electric-arc discharge—would "lase" in brand-new colors. This discovery opened the entire range of visible light to laser action; up to that point, only helium neon and ruby produced visible laser light, mainly in red. Bell disproved the theory, widely held at that time, that ions could not be made to yield coherent light because of their short lifetimes. Other scientists quickly followed up Bell's important finding and a number of companies came out, ahead of Spectra-Physics, with argon-ion lasers, based on Bell's discovery.* Feeling

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*Spectra-Physics has just received a patent on the ion laser and will try to enforce it. The patent situation in the laser business is confused. Research Corp., a New York-based nonprofit foundation, is suing Spectra-Physics for alleged infringement of a patent issued to Charles Townes. He shared a Nobel Prize with two Soviet scientists in 1964 for research that led to the laser. Townes assigned his patent rights to Research Corp. and shares royalties with it. His patent describes a maser that amplifies microwaves, and the question is whether the laser falls under the patent. Research Corp. is asking a 2 percent fee on sales of the laser itself, excluding accessories and power sources. Some companies have taken out licenses from Research Corp., but Spectra-Physics has refused, calling Townes's patent invalid. If Spectra-Physics is forced to pay royalties, that "will not have any material adverse effect on its operations," says Dwight.



the amount of protein, fat, and water. Ralph Nader says that a can of pet food is more explicitly marked than most human products. It is, in fact, conceivable that some animals are getting more nutrition than their owners. Dr. Jean Holzworth of Boston's Angell Memorial Animal Hospital says that cats often eat better and more expensively than owners. M.I.T.'s Dr. Newberne agrees that pet-food manufacturers have formulated well-balanced foods. Whether this highly fortified diet is good for animals, though, is another question, because some owners overfeed their pets.

Whenever a food company introduces a new product, the immediate problem is to gain space on the supermarket shelf. For the pet-food people, the problem was initially a thorny one. The food chains, which are used to handling fast-moving staples for human consumption, had to be persuaded that pet food was a product worth handling. Here, the manufacturers had a very persuasive weapon. For some unfathomable reason, price is of little significance to the average pet-food buyer. Indeed, it

sometimes appears that the higher the price, the more popular the product. So prices were set at a level that would give an attractive profit margin to supermarket buyers. Even today, with competition much tougher, the return on pet food to the supermarket chain is 16.8 percent, more than that for cereals, soups, and detergents.

Because buyers tend to switch from one variety to another, the manufacturers produce an astonishing number of brands. Among them, the five leading companies put out over 100 different products, and new concoctions are constantly being tested in regional markets. Ralston Purina puts out twenty-five varieties for cats and seven for dogs; the company covers the field in pretty much the same way that Procter & Gamble blankets the laundry-products business.

The horse under the sink

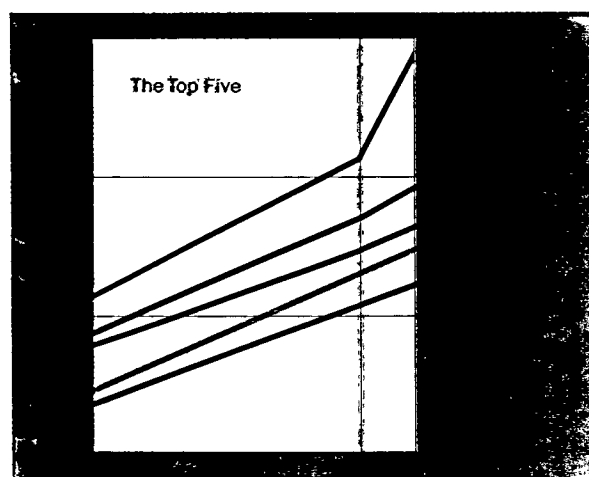
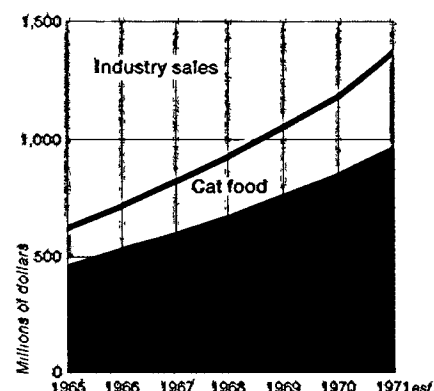
Ralston Purina relies heavily on television to promote its wares, and scatters its commercials throughout the day in order to catch the attention of the housewife. (Some 90 percent of its \$30-million advertising budget is spent on television.) A great deal of care goes into the production of these messages, and the company is constantly analyzing the psychological effect of the commercials on viewers. One series of commercials for Chuck Wagon, an instant dinner for dogs, has an almost hypnotic appeal. Whether by design or not, Ralston, after interviewing a cross section of the TV audience, discovered that the female viewers were fascinated by an abundance of symbols relating to sexuality and procreation. Market-research analysts described the audience reaction as follows: "Wagons and cabinets are, symbolically, womblike enclosures. The perceived episode of a galloping horse under the woman's kitchen sink, getting into her cabinet, followed by the little dog that wants to be fed is a symbolic tale of impregnation. And for some homemakers the watching of this commercial is a means

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More Dogs, More Cats, More Sales

Some 31 million families now own pets, and almost half of them buy specially packaged food for their animals. Sales of pet food will total \$1.4 billion this year, and have been increasing by an average of \$120 million annually since 1965. The chances are that this trend will continue, for the dog population is increasing by over one million annually, the cat population by something over 300,000. The effect of this growth is visible in the sales trends shown in the two charts at the right. Between them, the companies listed on the

lower of the charts account for some \$920 million in sales, and have about 68 percent of the market. While Ralston Purina still has a commanding lead, Carnation and Liggett & Myers have grown at a pretty fast rate too. This year Carnation's pet-food sales will exceed \$120 million and are some 238 percent higher than in 1965. Liggett & Myers, with sales of \$150 million, is something of a phenomenon. By specializing in Alpo, a canned dog food, L. & M. derives about 80 percent of its pet-food sales from a single product.



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on a par with any other.

Many people deciding that the claim of the law to
honesty, integrity and neutrality is

FALSE

IS IT ANY WONDER THAT THE PUBLIC SENSES TROUBLE IN THE LAW?

"WE SUDDENLY FEEL THAT LAW IS VULNERABLE"

by Robert H. Bork

Law has entered upon troubled times. Along with the other major institutions of Western culture, it is beset by malaise and self-doubt. Seeming strength and sensed weakness combine in an uneasy blend. It is a time when the law lays claim to broad new domains of human life, yet the prestigious Association of the Bar of the City of New York feels impelled to stage a major symposium on the question, "Is Law Dead?" It is a time when young men and women are turning to legal careers in greater numbers than ever before, and when law students are less sure than ever before that their studies have meaning. It is a time when thoughtful men are concerned as rarely before with the need to uphold law against violence, and when scholars can maintain in public that it is wrong to try men for political murder. We look apprehensively toward a future in which the nature of law and its role in our affairs will have altered in ways now almost impossible to discern. We suddenly feel that law is vulnerable.

Law, it is true, has never been as solid and certain an institution as we pretended. The more thoughtful members of the legal profession have always realized that they were not sure what law is or why it has a paramount claim upon the citizen's allegiance. To others, however, and certainly to the laity, law was obviously a system of logical and interlocking rules by which life was governed. There were answers to important questions in law libraries. Few troubled to disabuse us. I remember still the shock I felt on being told on the first day in law school that the law is a mystery, that it is, in its deepest essence, unknowable. My classmates and I supposed that the great man (later to become dean of the school and then president of the university) said such things merely to snap us out of our civilian torpor in much the same way as the drill instructor in boot camp speaks some shocking phrases to loosen one's attitudes for the remolding that is to come. It simply could not be the case that the law was unknowable. If that were true, how could Holmes have said that it was possible to live greatly in the law? Why did old lawyers quote approvingly the aphorism that law is a jealous

mistress who will brook no other? There must be something that made it worth the devotion of a lifetime.

The attitude was no doubt callow and romantic, as befits young men, but it lured many into the law, and the profession still finds it useful in recruiting new members. My own case was not, I think, untypical. A college instructor, a poet who had taken a law degree himself, confirmed my leaning to the law. He said that law was the most noble of all human studies, for it brought philosophy into the marketplace. That was what my classmates and I knew must be true; it was certainly what we wanted to hear. The law was to be a profession of never ending intellectual endeavor, a study concerned with the ordering of complex human affairs through the application of reason. The law itself seemed almost a tangible thing, accreting like a coral reef over the years through many thousands of arguments and decisions by a procession of lawyers and judges, and yet achieving the form of an unimaginably magnificent cathedral. We could almost discern its structure, vast, adorned with endlessly rich and fascinating detail, containing an infinity of passages and rooms, but with each part in integral relation to the rest and in harmony with the main supports and the foundation. Yet it was a structure, too, that was continuously growing and changing as men labored to see its design and improve small details in the brief light and time given them. A life in the law, we thought, promised battle, demanded devotion, and rewarded learning. And who would not choose to be soldier, priest, and scholar?

The uncertain establishment

Some years have passed now, and there are days when that vision seems merely amusing, or perhaps poignant. The magnificent edifice of the law has not become clearer but instead has receded, perhaps finally, into the mists. In middle age we suspect that it was nothing but a product of our imaginations to begin with.

These reflections are not merely personal. There is abroad a feeling of disappointment with and about law, a suspicion that it may be weak and unsure. This feeling is particularly frightening because we turn increasingly to law as other supports seem to fail us. The legal establishment itself is uncertain. The signs are everywhere.

Signs are apparent in our attitudes toward the courts,

Professor Bork, a graduate of the University of Chicago Law School, now teaches at the Yale Law School. Several other articles by him have appeared in FORTUNE, most recently "Anti-trust in Dubious Battle" (September, 1969).

where we have come to accept major philosophic shifts as inevitable with changes in personnel. Signs are also apparent in the law schools, where the traditional intellectual thrust and self-confidence of the faculties have been damaged. One perceives now, despite rising enrollments, signs of lowered morale and uncertainty about the purposes, content, and even worth of legal education. The major law firms are worriedly attempting to adjust to the altered demands and interests of the new graduates, trying to understand their lessened drive and vague career aspirations, asking the faculties why the top-rated students do not appear to be interviewed. The bar, so sure of itself and its functions just a half dozen years ago, is wondering aloud whether this is a passing phase or the end of the established order and the birth of a new, bewildering, and as yet undefined legal culture.

The core is missing

With the legal establishment itself betraying uncertainty and even timidity, it is not surprising that the public senses trouble in the law. And, since law represents stability and safety, is it surprising that sensed weakness should stir disquiet and even anger?

The trouble springs in large part from our inadequate understanding of law and its uses. The striking, and peculiar, fact about a field of study so old is that it possesses

capabilities, but when we ignore its limitations we damage law and place in peril the benefits it can confer. Law is now in serious danger of overreaching its capabilities, and may in fact already have done so. This is an ominous development, both as a symptom of social decay and as a likely cause of further deterioration in the social fabric.

We have also damaged law, and created disrespect for it, through our failure to observe the distinction, essential to a democracy, between judges and legislators. The era of the Warren Court was, in my opinion, deeply harmful to the prestige of law. There are many who insist that, as a direct result of the Warren Court's reformist drive, the prestige of law has never been higher. They point to the greatly increased numbers of young people entering law as evidence. The admirers of the Warren Court, however, are less in love with law than with power, power to produce results they like. Implicit in the idea of judge-made constitutional law are the ideals of adherence to general rules, of consistency, and of intellectual rigor. These were qualities in short supply in the Warren Court's record. If that Court did indeed inspire the young, it taught them to confuse the desirability of ends with the legitimacy of means, perhaps to confuse the idea of law and the fact of power.

Our culture has long stressed the importance of law, and Americans are probably as concerned with law as any



very little theory about itself. There is no body of systematic learning about the law's inherent capabilities and limitations. I have heard an eminent economist who became closely acquainted with a major center of legal scholarship remark with astonishment: "You lawyers have nothing of your own. You borrow from the social sciences, but you have no discipline, no core, of your own." And, a few scattered insights aside, he was right.

Good lawyers, a combative, hard-edged breed, are intellectually imperialistic, priding themselves on their ability to ransack other men's specialties quickly and beat them in argument on their own grounds. But it should cause imperialists some embarrassment to reflect that though they regularly invade and reap the harvests of other men's territories, the home country remains unsubdued. There is a price to be paid for that neglect, and the price appears to be the diminished effectiveness of law and decreasing respect for law. It would be well to begin to talk about the problem. Perhaps parts of it must remain insoluble, but we can do better than we have done, and at the very least we may be able to avoid misidentifying the cause of our troubles, and perhaps head off panicky responses that make matters worse.

One aspect of our unease may derive from our tendency to use law too much, to view it as an infinitely expandable carrier of social policy and norms. Law is not an implement that can be turned to any purpose. It has enormous

people on earth. But there exists a strong counterstrain, a tendency to idealize men or groups who set themselves against law and seek their ends through direct action. The ambivalence toward law that this counterstrain creates appears to be strongest in persons with more education, leisure, and affluence than the average. It is closely related to the tradition—now especially strong in literary and academic circles—according to which the enlightened man must continually be in opposition to society, particularly to bourgeois society. Violence from the political right is abhorred, but not violence from the left. The rhetoric of the left is more appealing to prevailing modes of thought—and after all, the argument runs, society has been slow to undertake necessary reforms. Hence the support and sympathy shown in journalistic and academic quarters for such representative figures of our times as the Berrigans, prison rioters, student militants, Black Panthers, Yippies, *et al.*

The tradition of support for civil disobedience and even violence is deeply disturbing, particularly disturbing because it is so firmly established in the institutions that mold opinion. There is a limit to how much defiance of law a legal system can tolerate. No one knows precisely where the tipping point is, but it is undeniable that our system is beginning to feel the strain. Disrespect for law is contagious. As Hannah Arendt warns, "The practice of violence, like all action, changes the world, but the most

probable change is a more violent world." Since violence and defiance of law are often successful in our society, they are not, in the short run, irrational means. But in the slightly longer run, if they become the common mode of political struggle they will be disastrous for everyone.

Those who use or advocate coercion and disruption for political or ideological ends have a ready model in the legally sanctioned struggle between labor unions and management. Our labor law, and the ideology that supports and suffuses it, encourages the organization of employees into fighting groups, and lets the wage bargain depend upon the outcome of the fight. The rhetoric of union organization and struggle is the rhetoric of war. The method of struggle, by both sides, is coercive, each attempting to put intolerable pressures on the other in order to achieve a favorable if temporary treaty of peace.

It becomes increasingly difficult to maintain a consensus that the legal right of private employee unions to strike and disrupt (and of employers to lock out) is somehow different from the desire of other groups to do the same. One element in the inability of some faculties to resist educationally inappropriate student demands, backed by threats of mass disruption, was the frequently advanced analogy of the students' position to that of workers. Sensing the drama and power it created, students eagerly cast themselves in the role of proletarians,

limited role to play in governing. Law is successful when there is a consensus that certain behavior cannot be tolerated, when groups with legitimate interests to advance are nevertheless perceived by the society as lacking any legitimate right to disrupt, to wage limited wars. The question, and it is by no means an easy one, is whether we will be able to sustain our denial to nonlabor groups of the tactics we concede to labor organizations.

There may be room for pessimism. William J. McGill, the president of Columbia, argues that the university, in finding forms to cope with the various groups that make demands upon the administration, is providing a model for "pluralism" in society at large. "One of the greatest achievements of American law," he says, "has been construction of the rules of orderly conflict between management and labor, embodied in our now classical concepts of labor law. We need a closely related legal framework for working with social change and with the conflicts engendered by the variety of liberation movements now developing on campus." This is a disturbing view. It should be clear that the management-labor model is a warfare model, and that its acceptance as the general mode of effecting change would be disastrous for law and social peace. The results, indeed, might be so intolerable that law would return in a far more repressive form than any we now know.



and many faculty members accepted the metaphor. Picket lines, strikes, disruptions are now becoming the common coin of political dispute, used by groups ranging from welfare recipients to women's lib. Not law but willingness to inflict inconvenience and discomfort, or sometimes worse, becomes the decisive factor in disputes.

When law is invoked, as in certain strikes by public employees, it is often only partially effective. Frequently it is brought into play with the understanding that sanctions will be modified or lifted entirely if the objectionable behavior ceases. In the course of student disorders the authorities may bring law to bear, but the demand for amnesty is frequently made and frequently granted as part of the bargaining process. Law is then perceived by the immediate participants to the struggle, and by the general public, as merely one weapon usable in combat. Law becomes thought of not as the ultimate command of our society, but as simply one element of power in a complex struggle. This view of law denies it any claim to unique respect. It is on a par with any other kind of force.

A claim of omnicompetence

In this way, domestic law begins to descend to the status of international law, which means that we begin to recognize the independence, the semi-sovereignty, of various warring groups within the society. When we view groups somewhat as nations, we admit that law has only a

Even as we increasingly accept the absence or only partial effectiveness of law in many social controversies, we are simultaneously introducing law into others where it had never before had a role. One of the most striking developments of recent years is the ubiquity that law is attaining. This appears to be an unreflective trend rather than a self-conscious process that anybody has thought out. Law spreads and seeps into ever more aspects of life, claiming an omnicompetence it cannot sustain.

Law is growing from many sources. Floods of regulations are churned out by Congress, state legislatures, municipal governing bodies, courts, executive officers, and administrative agencies. Since the New Deal, we have become accustomed to massive intervention of law in the economic life of the nation, and now we are seeing a similar proliferation in social and cultural spheres. With the substance of much of this law I have no quarrel, but there are costs to the use of law, and in some areas of life the costs may exceed any conceivable benefits.

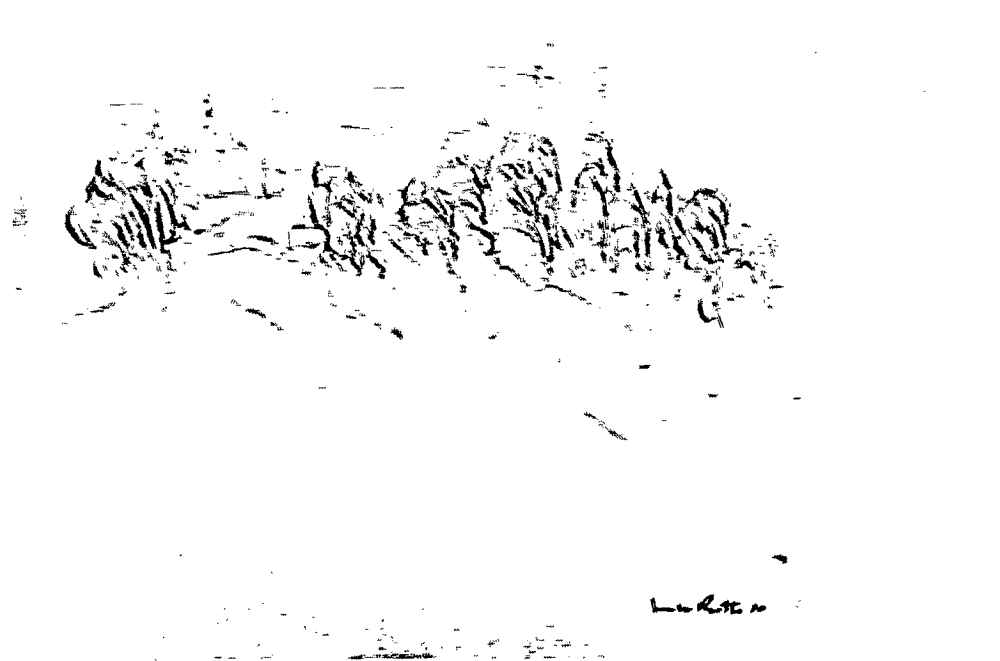
No society can be healthy and effective if all disputes are drawn into legal processes. The spread of law throughout human relations signals not only a decline in individual freedom but also a withering of community, traditional modes of accommodation, and informal authority. A healthy society requires that there be considerable play in human relations, a degree of trust in the good faith of others, confidence that things can be worked out tolerably,

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The Chicago skyline

Central Park, New York City



"WE SUDDENLY FEEL THAT LAW IS VULNERABLE" *continued from page 117*

a willingness not to insist on every "right" one may think one should ideally possess, and a large amount of individual self-reliance. The attempt to define all the rights of individuals and to enforce them by legal processes signifies the diminution or disappearance of these virtues.

An excessive and oppressive legalism is taking hold even where law in a formal sense has not entered. A prime example is afforded by the universities, where there has been an unprecedented demand (and an astonishingly ready acquiescence to it) that everyone's rights be spelled out in written codes and that special tribunals be created to enforce them. In universities throughout the nation we have seen the adoption of codes, often quite complex, concerning student behavior, faculty and administration powers, the process of decision making within the university, and even such matters as discrimination in hiring by employers who visit the campus. Presidents and deans are stripped of wide areas of discretion, rights and duties are spelled out, special tribunals for indictment, trial, and appeal are created. The analogy to formal legal systems is so powerful that these procedures begin to pick up elements of due process, right to counsel, proof beyond a reasonable doubt, exclusion of hearsay, peer-group representation on tribunals, and so forth.

These developments are further along in universities than elsewhere, but various groups are beginning to make similar demands on other institutions. Demands that corporate boards include representatives of consumers, environmentalists, labor, racial and ethnic groups, and the like, represent a shift toward political decision making as the mode of governance of these organizations. And we keep hearing demands that the internal processes of corporations be judicialized—the theory being that large corporations have as much "power" as state governments.

Reflections of paranoid feelings

The increasing legalization of our culture is a sign of the deterioration of the culture, and particularly the breakdown of community. Groups feel themselves set apart and requiring the protection of law from what is perceived as the hostility of strangers—people who not long ago would have been accepted as members of the same community. Such paranoid feelings are reflected, for example, in those student demands for codified rights. It makes little difference that the distrust is usually without objective justification.

Nor is it likely that law will significantly repair the broken sense of community. In an earlier article in this series ("The Angry Young Lawyers," September) my dean, Abraham S. Goldstein, was quoted as saying: "As home, church, and ideology began to lose their cohesive force, law was increasingly seen as a way not only of expressing pre-existing norms but also of creating them." And of course law, though its capacities in that respect are probably quite limited, can help generate norms. But a reliance upon law to replace home, church, ideology, and the sense of community seems likely to make matters worse rather than better. The intrusion of law and its coercions is a continuing reminder that trust, community, ease of relationship, have diminished. When even relatively minor disputes are referred to the legal process, they become freighted with emotional and symbolic importance. The divisiveness inherent in adversary procedures begins to operate. Disputes are made more visible and the drama of conflict tends to polarize the participants.

Thus law does not always repair broken community; it may, on the contrary, put an additional strain at precisely the wrong time on the waning strength of home, church, and ideology.

The trend toward legalization does more than impair the ease and civility of life. It requires the diversion of time and energy from other tasks to those of manning the legal machinery. More than that, the uncritical extension of law to new fields—whether formal law made by legislatures and courts or the informal variety growing within universities and other institutions—brings into adjudicative settings decisions that do not belong there. Adjudication requires standards that are real and susceptible of proof. Law is full of instances in which lack of adequate criteria made the hearing process an empty ritual. Some time ago, as a result of statutory misreading, the Supreme Court demanded that the field prices of natural gas be regulated by the Federal Power Commission. Since the unregulated field price was competitive, regulation, if it was to accomplish anything, had to hold prices below competitive levels. For a variety of reasons, a cost basis made no sense, so the commission and the reviewing courts were left to decide cases without real criteria. At last report they were still floundering in their attempts to find law for the problem.

The value of unwritten standards

Certain forms of discrimination present the problem of criteria that are real but cannot easily be established by evidence. It is easy enough to establish whether a person has been turned away from a restaurant because of race or sex—the variables are few. But employment discrimination presents a different problem. The decision concerning who is to be hired or not hired, who is to be promoted or passed over, does not always, or perhaps even usually, turn upon objective and quantifiable data. Such decisions also rest upon elements of judgment and intuition. On a case-by-case basis, therefore, the employer's decision will usually turn out to be unreviewable. Unless he admits bias, it is almost impossible to prove that he discriminated. This, it appears, is the reason federal programs in this field, including the President's "Philadelphia Plan" for the building trades, have had to impose quotas in order to be effective.

In other cases, law intrudes in decisional processes that are better left to managerial discretion, and so renders institutions less effective and often less humane. Universities, for example, have long had standards of conduct that were customary and unwritten or, if written, so vaguely worded as to be in effect customary. People understood with tolerable certainty where the lines were. Administrators handled most infractions informally and were able to take account of such factors as the character of the student, the likelihood of repetition, and the morale of the student body. These are matters that a formal hearing process cannot deal with. Other difficulties aside, the mere adoption of an adjudicative setting makes such nice judgments about persons seem improper. The trappings of law raise expectations of impersonality and "objectivity." As control over the institution of formal proceedings is itself increasingly formalized, cases are made of situations better left to informal discussion or admonition.

We need more thought and greater sophistication about the kinds of issues and decisions that can profitably be referred to formal legal processes and the kinds that ought to be left to other processes. We are beginning to see that there are areas in which a government of men rather than of laws is to be preferred. Sometimes, as in the case of employment

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The Common Market Is Still Good News *continued*

crises, further unilateral parity changes, and improvised patching-up operations, but on balance the members will be moving toward common rather than individual determination of economic and monetary policy. The general realignment of exchange rates in the offing will at least allow the Werner Plan, now in suspended animation, to be resumed on the basis of more realistic parities.

Until now, Community institutions have had only a limited power of the purse. They have been dependent on subscriptions by governments to defray the housekeeping costs of the Brussels "Eurocracy" and the rest of the Community budget. Beginning in 1973, however, the E.C. will have more financial resources of its own—from the levies on imported agricultural products, from customs duties on imports of manufactured goods, and possibly also from a small slice of the revenue raised throughout the Community by the value-added tax. The E.C.'s budget will need to be subject to Community parliamentary scrutiny. This will require the allocation of greater powers to the European Parliament, at present a poor shadow of a legislature whose main function consists of the right to demand information from the commission and council. In such ways, little by little, the Community will extend its powers and acquire political form.

A test of bona fides

In foreign-trade policy, the Community has less time. It must assume at once a political role commensurate with its economic importance or the whole prosperous postwar trend toward trade liberalization and trade growth will be put at risk. The successful negotiation of the Kennedy Round by the Six, bargaining as a single unit, was the most impressive performance of the old Community on the international stage. Now the degree of cohesion and reasonableness shown by the Europeans in the effort to agree on a new alignment of parities will be an initial test of the international bona fides and the solidarity of the larger Community.

Prosaic as it may seem, one major immediate requirement of Europeans and Americans who seek further trade liberalization is better communication between Brussels and Washington. What is needed is a mechanism that would permit a higher-level hearing while new policies are being formulated—the chance to get a word in edgewise when it can still affect decisions. West German Chancellor Brandt has proposed formation of a joint committee of senior government officials with representatives from business to maintain contact between the U.S. and the Community.

A realistic timetable for major international trade negotiations must look ahead a few years. A start cannot be made until the surcharge has been removed. The year 1972, a presidential election year in the U.S., is unsuitable for seeking new negotiating authority from Congress. In Europe, furthermore, 1972 will be the year of ratification procedures for enlargement of the Community, and a year in which the Community will be preoccupied with the institutional problems associated with enlargement. Thus no major initiative from either side of the Atlantic can be expected before 1973—which of course does not mean that it would be wrong now to start thinking about what could be done. Indeed, a high-level working party in O.E.C.D. is being set up to do just that.

The years after 1973 should be the time for concerted efforts to reduce trade barriers between the U.S. and the

enlarged Community. This period is auspicious for several reasons. There is already a general awareness that tariffs, nontariff barriers, exchange rates, burden sharing, agricultural protectionism and preferences are all relevant to trade and must be considered in major international negotiations. By the end of 1972 or early 1973, the O.E.C.D. working party will have made its recommendations on how best to proceed toward further liberalization. The GATT secretariat, with its catalogue of hundreds of nontariff barriers, is already waiting in the wings. Fortunately, a number of preferential agreements expire in 1974-75 and can be given a fresh look. These include the Yaounde Convention, which associates eighteen African states with the Community, the Arusha Agreement, which does the same for three other African states, the Commonwealth Sugar Agreement, and a number of E.C. trade agreements with Mediterranean countries.

Time for a "Community Round"

If the U.S. Congress will grant the required negotiating authority during 1973, it might even be possible to bargain on a larger range of national interests than tariffs alone. John Davies, Britain's Secretary of State for Trade and Industry, says, "I think the time will be ripe for a new initiative in international trade liberalization by the mid-Seventies. I hope the European Community with Britain can be a strong influence in such trade-barrier abatement."

There is a growing consensus on both sides of the Atlantic that the initiative for the next major international round of trade negotiations should come from Europe—that, after the Kennedy Round, there should be a "Community Round," underlining the determination of its members to play their new role constructively. A gesture in this direction could come from the summit meeting of the ten heads of government of the enlarged Community, which is expected to take place early in 1972. Such an initiative should be very welcome to the U.S. After all, the Trade Expansion Act of 1962 set the goal of negotiating to zero the tariffs affecting items on which the U.S. and the Community accounted for 80 percent of world trade.

Europeans certainly owe much to American high-mindedness in the postwar world. But the U.S. also benefits from the kind of Europe that has emerged—a Europe that has provided not only a key area of growth for American corporations but also a market for direct American exports in which, year after year, the U.S. could earn a surplus on its trade balance. And for all the annoyances of dealing with a Europe whose interests are no longer simply an extension of our own, the U.S. should see the political importance of an economically vigorous European Community whose members are increasingly bound together by ties of enlightened self-interest. Would we really rather have West Germany conducting Ostpolitik on its own instead of as part of a Community of Ten? Would we really rather have the Communist parties of France and Italy and their Communist-dominated trade unions running loose in a fragmented Europe or embraced in a prosperous and predominantly moderate Community?

Chancellor Brandt has stated the case well. "The Americans used to say integration has to go faster," he observed in a recent FORTUNE interview. "For years they were the better Europeans. But it all took a terribly long time. The political sex appeal is gone now and instead there are worries that in some respects Europe is a difficult partner. But surely the United States should still prefer having a strong West European partner, someone with whom it can talk seriously about what we should do together in the world." END

One thing you don't have to leave behind is your Blue Cross protection.

That's one of the unique things about Blue Cross. We don't desert you.

For instance, did you know that Blue Cross doesn't cancel coverage because of poor health? We're there when you need us most.

And did you know that you can transfer your Blue Cross protection from state to state if you should move to a new job? Without loss of coverage. You can even transfer from group membership to individual membership if you leave your job.

We recognized years ago how mobile the American people are. So we worked out a system to make our protection as mobile as you are. Under this system, all 75 local Blue Cross Plans agree to accept each other's



members as if they were their own.

A high speed computer in Chicago handles all the details. Through it, we can send membership information back and forth across the country. From Plan area to Plan area. From one state to another.

Our Inter-Plan communication system does something else for you, too. It guarantees that you

can be admitted to almost any hospital anywhere in the country, just by presenting your Blue Cross card. And be welcome.

This continuous kind of coverage is one of the things that makes Blue Cross health care cost protection unique. You may never have thought about it. Or even realized it was there. But someday, somewhere it could mean a great deal to you.

As America's largest voluntary, non-profit prepaid health care plan it's nice to be able to make this very personal promise. Wherever you need us, as long as you want us, we're there.

Blue Cross
*74 million Americans strong.
And growing stronger.*

"WE SUDDENLY FEEL THAT LAW IS VULNERABLE" *continued*

discrimination, we may be willing to pay the costs that the use of law entails, but then we should be skillful enough to frame the criteria in ways that law can handle. We must remember that law is a blunt instrument, and that we cannot use it effectively if we assign it tasks requiring a scalpel.

A need for *laissez faire*

Law in our society is overextended in yet another sense. We have pushed too many policies that are too complex into the courts. In judicial institutions as in economic units, there are problems of economies of scale, problems of optimal size and work load. The principle that some specialization is essential to effective work cannot be overlooked. No other nation thrusts as many policy issues upon its courts as do we. In such varied aspects of life as antitrust, labor relations, rules governing elections, entitlement to government benefits, and criminal-law procedures, courts are confronted with major substantive issues left unresolved by other branches of government. As a result, American courts are overloaded with broad and profound questions of economics, sociology, political philosophy, criminology, and so on and on. They do not, it must be said in all candor, handle these questions very well. Very often they do not handle them even passably. That is not surprising. No man or group of men can deal effectively with such a range of subjects. The result is that over the decades there has been a marked decline in judicial performance, and complex social policies are being deformed or rendered simplistic in the very process of their application. The two fields that I know best, antitrust law and constitutional law, are in states of intellectual chaos. My colleagues tell me that their fields of interest are in no better condition.

The lesson may be that a society cannot afford too many complex social policies, that some large admixture of *laissez faire* is required simply because regulation that might ideally be preferable will in fact, because of our inability to apply it without deforming it, turn out to be worse. Or perhaps the moral is that we must require legislatures to spell out their policies with considerably greater precision and specification than we now expect. In a society where customary modes of doing things are trusted, legislators can leave the detailed working out of policies to administrators, but that is no longer our case. And if we insist upon judicial participation in the application of policies, we must protect the judiciary by also insisting that legislators provide more guidance.

It is sometimes argued that we could devise new institutions to relieve the courts of some of their unmanageable tasks, but that is not a particularly happy thought. Beginning with the establishment of the ICC in 1887, we have spawned any number of administrative tribunals and agencies to frame regulations and decide cases, subject to judicial review. The results, most observers now admit, have been dreadful.

Yet somehow we must make the work of the courts more manageable. The alternative is to lose the benefits that courts can give us: scholarship, a generalist view, wisdom, mature and dispassionate reflection, and—especially important—careful and reasoned explanation of their decisions.

Related to these issues is a development that threatens considerable trouble in the future: the increasing use of litigation as a shortcut to the achievement of desired political and social ends. I do not want to be misunderstood here. Some political and social changes inhere in accepted legal

principles, and litigation quite properly both discloses and forwards these changes. All the implications of a principle are not evident upon the first enunciation of it. Thus the principle of racial equality before the law, contained in the Fourteenth Amendment, quite properly resulted at length in the Supreme Court's decisions—in *Brown v. Board of Education* and the cases that came after—denying government the power to segregate or discriminate on racial grounds. Those litigations wrought an enormous change in our social and political structures and practices, but the result was a correct one for the law to reach.

The problem arises when litigation is used to accomplish results not inherent in any legal principle that the courts may properly rely upon. It is much cheaper and easier to ask a court to order the change you want than to go through the time-consuming, expensive, and messy process of persuading voters or legislators. And there is always the possibility that the voters or legislators will see things differently from you. Naturally, many groups and individuals accepted the invitation to substitute litigation for politics. And the Warren Court too often responded by ordering change based upon no discernible principle other than the majority's personal views.

A confusion of roles

It should hardly be necessary to say that this practice is inconsistent with the most fundamental theory of representative democracy. Our Constitution and our political ethos do not call for general government by judges. Many of the results the Warren Court reached were, in my view, politically or socially desirable. I would have voted for them as a legislator or as a citizen in a general referendum. But that does not begin to justify their imposition by a court acting on no existing legal principle.

The confusion of roles encouraged by the Warren Court undermines not only representative government but also the ability of law to govern at all. Though the Warren Court majority pleaded that it was merely applying the Constitution, that pretense fooled fewer and fewer people. Performance of this kind on the part of courts raises several dangers. Many people may decide that the claim of law itself to honesty, integrity, and neutrality is false. If law comes to be seen as something of a trick, political power will be seen as the only reality. In this perception lies the possibility of the destruction of the Supreme Court's constitutional authority. Worse still, those who decide that law is a trick will not easily distinguish between law made by judges and law made by legislators. Cynicism is not so easily confined, and disrespect for the Supreme Court may easily become disdain for what the Court symbolizes, the ideal of government by law rather than by whim, prejudice, or raw power. If the Supreme Court's power comes to be thought illegitimate, where will legitimate authority be seen to lie?

The perception that a Court is willing to be the political ally of certain causes, regardless of law, damages the moral authority of law, and law cannot be effective unless it carries moral weight as well as the threat of sanctions. Should any sizable and cohesive segment of the population come to feel that the only reason to obey law is the possibility of unpleasantness with the police, the costs of maintaining social order with present degrees of freedom will be prohibitive. We live in times when we cannot afford to dissipate any of the law's moral authority.

The present Chief Justice, Warren Burger, appears to be fully aware of the dangers of the misuse of courts. He has publicly worried that efforts to use law to bring about social

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"WE SUDDENLY FEEL THAT LAW IS VULNERABLE" *continued*

change have been "creating expectations that are beyond fulfillment." He has warned: "Young people who decide to go into the law primarily on the theory that they can change the world by litigation in the courts I think may be in for some disappointments. . . That is not the route by which basic changes in a country like ours should be made. That is a legislative and policy process, part of the political process. And there is a very limited role for courts in this respect."

A particular kind may die

The Supreme Court, however, may not find it easy to draw back from the activist, legislative pattern of the Warren years. The habit of bringing to the Court claims that belong in the political arena is not the less powerful because it is deeply illegitimate. Various kinds of claims are working their way through the judicial system, and the Supreme Court may ultimately have to face them—suits seeking judicial determination of abortion statutes, the death penalty, environmental issues, the rights of women, the Vietnam war. The Court should refer many of these issues to the political process, even though that will anger groups who have been taught to hope for easier, more authoritarian solutions.

The problem of social order is coming to the forefront in most advanced nations. Law must become more self-conscious if it is to meet the challenges that are being put to it. While it is not, of course, the only institution that creates social order, law is one of society's bulwarks, and it provides an impelling analogy or metaphor for social processes. Law is valuable for itself and because it teaches moral lessons to society. It is important that the lessons be the right ones. The right lessons will be taught only if we learn to use law correctly, to respect it as the ultimate arbiter of disputes where it is applied, to conserve its strengths by employing it only where it has clear benefits to give, and by insisting that the roles of legislators and courts be kept distinct. These tasks are not for lawyers alone, but until they begin to create the body of theory that their profession so desperately requires, there will continue to be unnecessary trouble in the law.

The stakes are far more important than the efficient functioning of law. The answer to the question "Is law dead?" is that law will never die. But a particular kind of law may die. Society will not long tolerate severe social disorder. Should law in its present form fail us, it will ultimately be replaced by other forms of law that will impose order. What is at stake, then, is not law but rather democratically made law allowing wide scope for individual freedom. That is worth preserving. END

The Texas Banker Who Bought Politicians *continued from page 99*

was being paid by the Fathers. But by this time he presumably looked upon their resources as almost his own. What Sharp really must have had in mind, beyond passage of a single bill, was building up an indebtedness among the state's politicians upon which he could again call at some future time. This was very much his style—he was in the habit of casting his bread upon the waters, as he had done with the Jesuit Fathers, with Will Wilson, with Jim Lovell. The investment he had made in Texas politicians must indeed have seemed promising. He had, at least in his own mind, established a claim for future favor on the governor, the speaker of the house, the most powerful committee chairmen in the house, the state chairman of the dominant party—even, if he believed the story he says Osorio told him, on the young Loch-invar who, many people in Texas supposed, was headed straight for the White House.

A shock for Shivers

At just this juncture, however, things began to go wrong. In the manner of a mythic hero, Sharp had overreached himself. Now, forces far more resolute than any he had previously dealt with were to strike him down.

The first to take serious notice of Sharp's activities, apparently, was Allan Shivers, chairman of the Austin National Bank and a director of several other large Texas banks. On a business trip to Houston in September, 1969, Shivers read in the newspaper one morning of the deposit-insurance bill that had just passed the legislature. The news, he says, "almost knocked me out of my chair."

Actually, Shivers could not possibly have learned from the brief item in the newspaper much of what the bill was about. What really must have shocked him so forcibly was the fact that such a bill had passed without his knowledge. As both a

leading banker and still something of a power in the Democratic party, he could normally expect to be consulted by legislative leaders on such a matter. What Shivers must have spotted was a bid for power that could challenge his own position—and might ultimately challenge the entrenched authority of the business lobby in Austin.

Returning at once to the capital, Shivers got hold of a copy of the legislation. Its vagueness and potential for fiscal mischief confirmed his fears. Soon he was on the telephone to Governor Smith, blasting the bill's legal and financial shortcomings. Smith, explaining he had "no knowledge of such things," asked Shivers to go over the bill with the legal counsel to the governor's office. Meanwhile, the state banking industry, which had not paid much attention to the legislation until it was passed, began to marshal its forces. The small bankers fell into line behind the industry leaders to fight the bill. Smith was besieged by calls from bankers in small cities and towns all over Texas. "I can't remember a really big banker, unless you consider Governor Shivers a big banker, who ever did call in," he now says. On September 29, the last day on which Smith could act without allowing the bill to become law, he vetoed it. Driving home from the capital that night with Dr. Baum, Smith decided to stop by Shivers' home and have a word with the former governor. Neither Smith nor Shivers remembers the conversation that followed.

The astronauts decline

Sharp had little time to fret over his defeat on the political front. Before long, the general drop in the market began to undermine the whole stock-manipulation scheme in which he was engaged with Ling & Co. By now, a large share of Sharp's personal fortune and of the Jesuit Fathers' assets were tied up in N.B.L. stock, and the stock was pledged against debts of the pyramid of companies and banks Sharp controlled with the Osorio and Carr group. Decline in the value of the stock therefore threatened the whole empire.

Desperately trying to avoid disaster, Sharp sought new

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The Texas Banker Who Bought Politicians *continued*

customers on whom N.B.L. stock could be unloaded. One attempt involved five of Lovell's fellow astronauts, including Charles ("Pete") Conrad, who had just returned from the moon. Conrad was approached by Lovell with a proposal that the five astronauts buy 22,500 shares of N.B.L., with "100 percent financing" to be arranged by Sharp. The astronauts at first were attracted by the offer, but finally decided to turn it down. Ling & Co. transferred the stock to them anyhow, billing them for \$641,250. Conrad complained to Lovell, who passed the word back to Sharp. Following a lunch at which Sharp explained to the astronauts, as Conrad remembers it, that "he was just doing something for us for what we had done for the country," the financier agreed, though "miffed and perturbed," to take back the stock.

A special rate for the Fathers

The 22,500 shares were next transferred to the N.B.L. Pension Plan, which at that time possessed total assets worth less than half the cost of the stock. Eventually, in July, 1970, the stock ended up with the good old Jesuit Fathers. This time, as the plotters' desperation grew, Sharp charged the Fathers \$24 a share for stock that was selling on the open market at about \$5. The Fathers' continued confidence in Sharp can be partly explained by the fact that they had got confused about the name of the company they were investing in and were following the American Bankers' Life Insurance Co. in the newspaper stock tables. The price of A.B.L. stock held steady while N.B.L. tumbled.

Despite the deterioration of his financial situation, Sharp continued to think big. Several times he told Lovell that he was considering buying control of Braniff and would like the astronaut to become president of the airline. In June, 1970, Sharp addressed a letter to Ling-Temco-Vought offering \$120 million in the name of Lovell, a Houston businessman named Bob Jordan Jr., and himself for 56 percent of Braniff's stock. Lovell says that he never saw the letter and knew nothing of the offer.

During the summer of 1970 the Securities and Exchange Commission began to take an interest in the flow of N.B.L. stock through Ling & Co. A few months later, the Justice Department entered the investigation. Will Wilson, under whose authority Justice's role in the probe would normally have come, says that he immediately reported his prior connection with Sharp to Attorney General John Mitchell, and took himself out of the case. According to everybody at the Justice Department who has since been involved in the matter, direction of the case was supervised by Wilson's deputy, Henry Petersen, a highly respected career officer, who reported directly to Deputy Attorney General Richard Kleindienst. There is no reason to believe that this is not true. But political considerations may nevertheless have influenced the Justice Department's handling of the case.

Last January, on the day before Governor Smith was to be inaugurated for his second term, the SEC filed civil charges in federal court in Dallas against Sharp, Osorio, Carr, Novotny, Michael Ling, Quincy Adams, nine other individuals, and thirteen corporations. That night the case was spread across the front pages of newspapers all over Texas. A run on the Sharpstown bank promptly followed, and the next week the bank failed. Smith and the other politicians who had been mentioned—though not charged—denied any

wrongdoing. Mutscher sadly reported that he had bought back into N.B.L. later in 1969, and when the stock collapsed had ended a net loser of about \$200,000. Jim Lovell returned his 25,000 N.B.L. shares to Sharp. "I felt it in the best interest of the government and myself," the astronaut explained, "that I turn back to him the stock." Waggoner Carr, who on the night the case broke had been meeting with political allies in Austin to plan a race for statewide office in 1972, decried the whole thing as a political vendetta by Will Wilson and the Nixon Administration. John Osorio was quoted as telling friends at a party in Austin: "What all this means is that Frank Sharp will make a deal, some politicians will make some money, and I'll probably go to jail."

Sharp strikes a bargain

During the months that followed, Sharp's attorneys, headed by Morton Susman, who had been U.S. Attorney in the Houston district during the Johnson Administration, did indeed begin to feel out the Justice Department for a possible deal. Negotiating with his Republican successor, Anthony J. P. Farris, Susman indicated that Sharp could provide barrels of incriminating testimony against his former associates. Nor did Sharp expect to get off scot-free—he would plead guilty to one count in return for immunity from further prosecution. Although Sharp was clearly the principal figure in the case and therefore under normal prosecuting procedures hardly an appropriate subject for immunity, Farris soon fell in with the idea. "I felt that without the testimony Sharp could give us most of the real sharks in the case would get away," Farris now says—though how there could have been a bigger shark than Sharp himself is hard to imagine. After bargaining Susman up to guilty pleas on two counts, each carrying a maximum sentence of five years in prison, Farris agreed to put the proposal before his superiors in Washington.

Petersen, the career officer who had taken over supervision of the case, reacted coldly to Farris' recommendation for immunity, but said he would let Kleindienst make the final decision. Kleindienst, an Arizona Republican who managed Barry Goldwater's presidential campaign in 1964, is among the shrewdest and most aggressive political operators in the Nixon Administration. He now argues, with some validity, that granting Sharp immunity could be justified if this led to successful prosecutions of elected public officials who had improperly used their positions for personal gain. It did not, of course, escape his notice that the public officials involved included most of the top echelon of the Democratic party in Texas. After ordering Farris to pin down Sharp's testimony more closely, Kleindienst approved the immunity.

On June 14, Sharp pleaded guilty in federal court in Houston to selling unregistered securities and making one false entry in the records of the Sharpstown bank. Accepting the plea, Judge John V. Singleton immediately fined Sharp \$5,000, and sentenced him to three years—on probation! It later developed that Judge Singleton, although he had never worked for Sharp himself, had at an earlier time been associated with two Houston law firms that once represented him. In the view of some Justice Department officials, the judge was influenced by his belief that the failure of Sharp's bank, which had at least been hastened by the publicity given the case, had been punishment enough. In his sentence, Singleton spoke of the deeds to which Sharp had pleaded guilty simply as "complicated business transactions."

Since receiving immunity, Sharp has appeared before a number of grand juries and investigating committees in Texas. He testified in the civil case the SEC won in Dallas

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FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

DEC 18 1972

TELETYPE

NR 01 CG PLAIN

1153AM URGENT 12/18/72 DJD

TO: ACTING DIRECTOR

SAC, WFO

FROM: SAC, CHICAGO (161-2424) (P) 1P

Mr. Felt	_____
Mr. Baker	_____
Mr. Callahan	_____
Mr. Cleveland	_____
Mr. Conrad	_____
Mr. Dalbey	_____
Mr. Gebhardt	_____
Mr. Jenkins	_____
Mr. Marshall	_____
Mr. Miller, E.S.	_____
Mr. Purvis	_____
Mr. Soyars	_____
Mr. Walters	_____
Tele. Room	_____
Mr. Kinley	_____
Mr. Armstrong	_____
Ms. Herwig	_____
Mr. Neenan	_____

MR. MARTIN
ROOM 1246

ROBERT HERON BORK, SPECIAL INQUIRY, BUDED PAST.

RE BUREAU AND NEW HAVEN TELETYPES 12/11/72 AND 12/12/72.

BORK MEMBER AMERICAN BAR ASSOCIATION, SHERMAN ACT COMMITTEE
SINCE 1969.

WFO INTERVIEW FOLLOWING FOR COMMENTS IF ANY ON BORK:

ALAN S. WARD, FORMER CHAIRMAN, FEDERAL TRADE COMMISSION,
WASHINGTON, D.C.

[REDACTED]

IF BORK KNOWN TO ABOVE, GET COMMENTS RE HIS
VIEWS ON SHERMAN ACT AND ENFORCEMENT THEREOF.

END

JGM FBI WASHDC CLR

161-9206-36
NOT RECORDED
12 JAN 31 1973

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58 FEB 5 1973

Spec. Inq.

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FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE CHICAGO	OFFICE OF ORIGIN BUREAU	DATE 12/21/72	INVESTIGATIVE PERIOD 12/13 - 19/72
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY SA 	TYPED BY mek
		CHARACTER OF CASE SPECIAL INQUIRY	

b6
b7C

REFERENCES: Bureau teletype dated 12/11/72.
Chicago airtel to the Bureau dated 12/15/72.
New Haven teletype dated 12/12/72.
Chicago teletype to the Bureau dated 12/18/72.

- RUC -

ACCOMPLISHMENTS CLAIMED					☐ NONE	ACQUIT- TALS	CASE HAS BEEN: PENDING OVER ONE YEAR ☐ YES ☐ NO PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☐ NO
CONVIC.	FUG.	FINES	SAVINGS	RECOVERIES			
APPROVED <i>RKM/12/2</i>						SPECIAL AGENT IN CHARGE	
COPIES MADE: (3) - Bureau (AM) 1 - Chicago (161-2424)						DO NOT WRITE IN SPACES BELOW <i>161-9206-37</i> NOT RECORDED DEC 26 1972	
Dissemination Record of Attached Report						Notations	
Agency	one cc Deputy AG					<i>Spec. Inv.</i>	
Request Recd.	JAN 3 1973						
Date Fwd.							
How Fwd.							
By							

55 FEB 7 1973

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COVER PAGE

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to:

Report of:
Date:SA [REDACTED]
12/21/72

Office: Chicago

b6
b7C

Field Office File #: 161-2424

Bureau File #:

Title: ROBERT HERON BORK

Character: SPECIAL INQUIRY

Synopsis:

BORK received AB Degree with honors, University of Chicago, 1948. Received JD Degree, University of Chicago Law School, 1953, ranking three in class of 53. Professors recommend. Employed 1955 to 1962 by Kirkland and Ellis, Attorneys, Chicago, Illinois. Practice there was principally antitrust work. Superiors and associates state brilliant lawyer who left firm for Yale professorship where could pursue writing career. USDC judges and most attorneys recommend. Two attorneys question appointment because of BORK's views on enforcement of antitrust laws. Member American Bar Association and several ABA committees. No greivances or unfavorable information with National Conference of Bar Examiners or Chicago Bar Association. No adverse credit. No arrest record located for BORK or wife.

- RUC -

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WJB/reg

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DETAILS

Education

University of Chicago (U of C)
5801 South Ellis Avenue
Chicago, Illinois

On December 13, 1972, [redacted] Receptionist, Registrar's Office, advised Special Agent (SA) [redacted] that ROBERT HERON BORK, born March 1, 1927, at Pittsburgh, Pennsylvania, attended the University of Pittsburgh 1944 to 1945, and was admitted to the U of C in January, 1947, with advanced standing in the college. He was awarded an AB degree in the college with honors in December, 1948. He attended the U of C Law School from October, 1948 to June, 1950, and from June 1952 to June, 1953. He was awarded a J.D. degree in June, 1953.

On December 13, 1972, [redacted] Registrar, Law School, advised SA [redacted] that BORK attended two years of law school from 1948 to 1950, and was then recalled to military service. He returned in June, 1952, and attended through June, 1953. He was awarded a JD degree on June 13, 1953, with a 75.06 grade point average. He graduated third in class of 53. He was Associate Editor of the Law Review in 1952-53, and was elected to the Order of the Coif. [redacted] stated the record reflects he was elected to Phi Beta Kappa, however, that is an undergraduate honorary and has no relationship to the Law School. She said BORK elected the professional option in effect at that time, entering the law school and completing work on his undergraduate degree at the same time.

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On December 13, 1972, [redacted] Professor of Law, advised he recalls the appointee as a student and post graduate research associate. He said the appointee resided in the neighborhood while employed by Kirkland and Ellis and he saw him occasionally until he left for Yale. [redacted] said he has no reason to question the appointee's loyalty to the United States, and has no reason to think that his character, reputation and morals were not the highest. He said the appointee was regarded as a conservative and was respected as a gentleman in every way. He said he has no adverse information concerning the appointee and recommends him for the position announced.

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On December 13, 1972, [redacted] Professor of Law, advised he recalls the appointee as a student, Attorney with Kirkland and Ellis and Colleague at Yale. He stated the appointee is a sterling individual, upright and competent. He said he regards him highly personally and professionally, knows nothing of an adverse nature concerning him and recommends him for a position of trust as an attorney with the United States Government.

Employment

Kirkland and Ellis
Attorneys at Law
130 East Randolph
Chicago, Illinois

On December 13, 1972, []
[] exhibited BORK's file which reflected that he began his employment as an attorney in October, 1955, but did not show the date he ceased employment. His file contained nothing of an adverse nature. Resume submitted by BORK at the outset of his employment stated that he had published the following articles:

1. "Comment, Extension of Relief for Unilateral Mistake", 17 University of Chicago Law Review, 725-733, (1950).
2. "Vertical Integration and The Sherman Act; The Legal History of an Economic Misconception", 22 University of Chicago Law Review, 157 - 201, (1954).

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[] stated that he does not know BORK.

On December 13, 1972, HAMMOND CHAFFETZ, Senior Partner, advised that BORK resigned from the firm in 1962 to accept a law professorship at Yale University. He said he recruited BORK in 1955 from a New York law firm, with whom he was then employed, after witnessing his work. He stated BORK's work with his firm was primarily in connection with antitrust cases but also included other matters. Said practice was exclusively in Federal courts and involved no criminal work.

CHAFFETZ said BORK is a brilliant lawyer, an excellent brief writer and a man of excellent character, personal habits and loyalty to the United States. He added that BORK assisted President NIXON in preparing busing legislation which advocated the use of buses under limited circumstances. He termed BORK a "devil's advocate" in that he liked to explore established legal positions to determine if they are sound. In these instances, he often clashed with other legal scholars. He stated that BORK is intellectually honest and if he is appointed

to the position of Solicitor General, he will be the lawyer for the Department of Justice and will support the Government's legal position. He stated BORK belonged to no extremist organization and held no extremist views. In his opinion, attorneys respected him even though they may not agree with all of his ideas. CHAFFETZ recommended him highly for the position of Solicitor General.

On December 13, 1972, [redacted], a member of the firm, advised BORK worked with him in antitrust cases which were not criminal matters but were usually civil cases, involving suits for treble damages. He said BORK has a first class legal mind and tremendous writing ability and they were sorry to lose him. His reason for leaving the firm was that he would have more opportunity for writing as a law professor than as a practicing lawyer. He knew BORK and his wife socially and considered both reputable persons of moderate habits. He does not know BORK's parents. He said BORK's writings have been on the conservative side but that he is not an extremist in any manner. He recommended him highly for the position of Solicitor General.

On December 15, 1972, [redacted] b6
[redacted] b7C, stated that he worked closely with BORK on antitrust, estate and corporate matters and that BORK is a terrific student and lawyer and "not an egghead". He added that he is also an excellent economist and approaches matters both from a legal and economic standpoint. He added that regardless of BORK's personal views, when he represents a litigant, he does so to the fullest extent, consistent with the law. He added BORK is not an arch-conservative, has no racial prejudices and respects the civil rights of all individuals. He said BORK was made a junior partner of the firm in record time because of his ability and they were sorry to lose him. He recommended him without qualification for any Government position.

On December 15, 1972, [redacted] advised he attended the University of Chicago Law School with BORK and has known him socially and professionally since that time. He said BORK is incisive and analytical with an inquiring mind. He does not accept all established

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legal positions and is wont to contest same if he believes that they are not sound. He called him an indefatigable worker who often worked far into the night. He said BORK's views on antitrust enforcement are somewhat different from court decisions in that he thinks too much regulation makes companies anti-competitive. He knows nothing in BORK's background, affiliations or associates which could embarrass or compromise him as Solicitor General, stated he has perfect qualifications for that position and recommended him highly.

On December 15, 1972, [redacted] stated he is one of BORK's "liberal friends", has worked with him and collaborated with him on a paper entitled "Political Activities of Colleges and Universities - Some Policy and Legal Implications", a copy of which [redacted] furnished. He considers BORK enormously bright and a man of integrity and fairness. He said BORK has been a "critic of the Warren Supreme Court" and believes that court has gone too far in using the antitrust laws in situations for which they were not intended. He added however, that BORK believes in antitrust laws with some modification of the application thereof. He knew of no civic or religious activities of BORK, adding that he spent his entire time with Kirkland and Ellis in working on legal matters. He added that at the outset, BORK worked under him but later BORK became the principal and he was the helper. In his opinion, BORK is an excellent choice for Solicitor General.

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b7C

Judges
United States District Court
Chicago, Illinois

The following investigation was conducted on
December 14, 1972:

Honorable EDWIN A. ROBSON, Chief Judge, stated that he was unable to recall BORK ever appearing before his court but has met him socially. He added that subsequent to the newspaper publicity concerning BORK's nomination for the position of Solicitor General of the

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United States, he has heard nothing but favorable comments concerning his appointment. Based on the above he recommended him.

Honorable J. SAM PERRY, Senior Judge, advised BORK has appeared before his court in several cases and "was always on the ball". He stated that BORK was usually assisting older attorneys during said cases but it often appeared that BORK was the brains of the presentations. It was his opinion that BORK usually entered the case when legal problems occurred. He considers BORK an excellent lawyer and believes he is a better court than a jury man because he wrote convincing briefs and made good arguments. He recommended him for the position of Solicitor General.

Honorable WILLIAM J. CAMPBELL, Senior Judge, stated he recalls BORK as involved in several cases before his court and, although he does not know him personally, considers him a capable attorney. He recalled one case where he sent BORK and an opposing attorney to Philadelphia to take depositions in order to get certain evidence before the court in an expedite manner. He said BORK did an excellent job on this occasion. He recommended him for the position of Solicitor General.

Attorneys in Midwest Office
United States Antitrust Division
Chicago, Illinois

The following investigation was conducted on
December 15, 1972:

[REDACTED], advised he was not in Chicago at the time BORK practiced law there and met him on only one occasion about three years ago at the Corporate Council Institute at Northwestern University. He said he knows him by reputation only and knows of no reason to object to his appointment as Solicitor General.

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[] Attorney, stated he was working for the United States Antitrust Office during BORK's stay with Kirkland and Ellis, but never met him or worked a case with or against him. He added BORK's general reputation, based on [] conversation with others, is that BORK does not believe in the Sherman Act. Therefore, he believes BORK would be "an unfortunate appointment" as Solicitor General because such an attitude, if true, would impair his judgement when Sherman Act cases come to his office with the recommendation from the Antitrust Division that they be appealed.

[] and [] attorneys of long standing with the Antitrust Division, both stated they have never met or had any litigation with BORK and are, therefore, unable to express an opinion regarding his qualifications for the position of Solicitor General.

Opposing Counsel

On December 18, 1972, [] Attorney, [], Chicago, Illinois, stated he opposed BORK in extended litigation concerning the estate of one OTTO YOUNG in approximately, 1960. The estate contained extensive real estate and money of which a bank, represented by BORK, was the trustee. The case lasted for several years and involved intricate estate matters. [] stated he considers BORK an able lawyer who is personable, cooperative, ethical and a decent man. He said BORK is a relatively conservative Republican while he, [], is a liberal Democrat. He recommended BORK highly for the position of Solicitor General.

Miscellaneous

On December 14, 1972, [] [], Midwest Antitrust Office, Chicago, Illinois, and presently associated with the law firm of Mayer, Brown and Platt, 231 South La Salle Street, Chicago, Illinois, stated he recalled no litigation by

BORK which involved the Midwest Antitrust Office. He has never been in court with BORK nor witnessed his legal work. However, he has heard him make speeches on antitrust matters before various bar associations, has conversed with him and read some of his writings. In his opinion, BORK advocates a much more limited and restricted antitrust program. He listed the following concerning his recollection of BORK's contentions:

1. He believes price fixing should be subject to the rule of reason and not illegal if it can be shown that the agreement does not affect reasonable prices.

2. He believes that many anti-merger cases which have resulted in stopping mergers have gone too far and believes many mergers are beneficial and should be permitted.

3. He believes agreements by companies on territory and customers should not be unlawful per se but should be subject to the rule of reason.

[] said BORK believes the present enforcement of antitrust laws is not in the public interest. He said BORK is a man of intelligence, scholarship, sincerity, integrity and an excellent lawyer. However, he believes him to be "out of step" with most antitrust views in Government. He said BORK would be a choice for Solicitor General of antitrust defense lawyers but, based on the above, he believes BORK's present views on antitrust enforcement are too extreme for the job. He added however that BORK's views may moderate if he is appointed.

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On December 15, 1972, []
[], Hart, Schaffner and Marx Company, 36 South Franklin Street, Chicago, Illinois, who formerly was engaged in private practice emphasizing antitrust matters during the period of BORK's stay in Chicago, stated he never worked with BORK on a case and his only association with him has

CG 161-2427

been at bar meetings. He added BORK is a highly respected lawyer and that his writings are perceptive and original. He said BORK approaches antitrust problems with a fresh view and is able to quickly arrive at the real issues. involved. [] agrees with BORK that in many cases the law is not applied to the proper situation. In his opinion, BORK is open minded with no prejudices at all against business and is opposed to enforcement of anti-trust laws only in improper cases. He recommended him highly for the position of Solicitor General.

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On December 14, 1972, [redacted] Attorney, associated with Mayer, Brown and Platt, referred to above, advised that he, [redacted], formerly worked as an attorney in the Antitrust Division, Washington, D.C. and from 1941 - 54 was employed by Solicitor General of the United States. During the last four years of this employment he was either First Assistant or Acting Solicitor General. [redacted] stated that he does not know BORK personally, but added that he is well known in the Antitrust Field as a professor, writer, and person of ability. His impression of BORK is that he considers the U.S. Supreme Court too severe in enforcing antitrust laws, adding that BORK has the reputation of pro business rather than pro government. He considers BORK well qualified for the position of Solicitor General and recommends him for that position.

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On December 18, 1972, Attorney [redacted] of the firm Aulthaimer, Gray, Naiburg and Strasburger, 1 North La Salle Street, Chicago, Illinois, advised SA [redacted] that he has known BORK for approximately 25 years, since both attended the University of Chicago Law School. During the period BORK was associated with Kirkland and Ellis in Chicago, they often worked together on cases of mutual interest, representing co-defendants. Since BORK left Chicago, their contact has been through correspondence. He stated BORK is a very able attorney and a decent human being of good character, reputation and morals. He knew of nothing in BORK's background or associations which could embarrass him as Solicitor General and highly recommended him for that position.

On December 18, 1972, [redacted] Attorney with Sonnenschein, Levinson, Carlin, Nath, and Rosenthal, 69 West Washington Street, Chicago, Illinois, advised SA [redacted] he has known BORK for about 13 years professionally and socially. He has never opposed BORK in litigation, but has seen him in many situations, including court room activity and professional meetings and has great respect for his ideas and judgement. He called him one of the most outstanding lawyers in the United States today. He spoke highly of his character,

reputation, associates and professional ethics. To his knowledge, BORK has never reflected any racial or other bias and is a completely fair individual. Although he is not of the same political party as BORK, [redacted] said he respects his ideas and believes BORK's political beliefs will have no bearing on his duties as Solicitor General. When he heard BORK had been nominated for that office he felt that the choice was "marvelous."

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Affiliations

American Bar Association (ABA)
1155 East 60th Street
Chicago, Illinois

On December 15, 1972, [redacted], Clerk, advised BORK is a current ABA member in good standing.

On December 15, 1972, [redacted] Clerk, National Conference of Bar Examiners, 333 North Michigan Avenue, Chicago, Illinois, advised her grievance files contained no listed grievances or any unfavorable information regarding BORK.

On December 15, 1972, [redacted]
[redacted], ABA, stated that he did not know BORK.

On December 15, 1972, [redacted] Division of Legal Practices and Education, ABA, stated that he does not know BORK but advised from records that BORK has been a member of the ABA Antitrust Section and a member of the section's Sherman Act Committee since 1969 and is currently appointed for the year 1972 - 73.

He said BORK also was a member of the Section's International Trade Committee, Subcommittee on Extraterritorial Application, U.S. Antitrust Laws, for the years 1970 - 72.

On December 19, 1972, [redacted] Attorney of the firm Lord, Bissell and Brook, 135 South La Salle Street, Chicago, Illinois, advised he was Chairman of Section on Antitrust Law of the ABA until his term expired in August, 1972. His association with BORK at ABA was very limited but he knew him when BORK was affiliated with Kirkland and Ellis in Chicago. On several occasions, he

and BORK represented multiple defendants in triple damage antitrust cases. These cases did not reach the trial stage but he participated in the negotiations with BORK on the same side.

[] stated BORK is a competent lawyer with a fine mind, who, if appointed Solicitor General, would vigorously enforce the Antitrust Laws, although he would have his own approach as to what the enforcement would be.

[] agrees with BORK that Antitrust enforcement is occasionally too strong under certain sets of facts, although definite violations should be fully prosecuted. He highly recommended BORK.

On December 19, 1972, [] Attorney, [] Chicago, Illinois said that although BORK and he are members of the Sherman Act Committee of ABA, he does not know him through that committee. He became acquainted with him through a case in which they had mutual interest which involved price fixing by U.S. Steel, Bethlehem Steel Company, and two or three other steel companies. In this action, [] was among the lawyers representing New York City and Chicago transit systems and BORK represented the New Haven Railroad. The suit, brought under Antitrust Laws, involved the price of wrought steel replacement wheels for trains and rapid transit system cars. [] and BORK represented plaintiffs and won the case.

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[] considers BORK a capable, conscientious, honest, and loyal American. He said BORK is somewhat less enthusiastic than some people about absolute enforcement of the Sherman Act, but that he has a professional attitude and would represent the Government to the best of his ability. He considers BORK's appointment as Solicitor General a fine appointment.

Chicago Bar Association (CBA)
29 South La Salle Street,
Chicago, Illinois

[] Clerk, advised SA [] on 12/18/72, that the CBA membership and grievance files reveal no information regarding BORK.

CG 161-2424

WJB/lan

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Credit and Arrest

On February 14, 1972, SC [] caused the records of the Chicago Credit Bureau to be examined and no information was located regarding BORK.

On December 14, 1972, SC [] caused the records of the Bureau of Records and Communication and also the records of the Intelligence Division of the Chicago Police Department to be examined and no arrest record was located for BORK or his wife CLAIRE BORK.

On December 18, 1972, [], Supervisor, Special Services, Traffic Violations Bureau, City of Chicago, 321 North La Salle Street, Chicago, advised SA [] that it is not possible to locate traffic arrest records without the traffic ticket number or arrest warrant number. She stated further that even if the number was known all records as far back as 1953 have been destroyed.

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The following investigation was conducted by
Special Agent (SA) [REDACTED]:

On December 14, 1972, [REDACTED], Glencoe,
Illinois Police Department, advised that a review of
records by his department failed to indicate any arrests
in the name ROBERT HERON BORK or CLAIRE BORK.

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On December 14, 1972, [REDACTED], Evanston,
Illinois, Credit Bureau, which agency covers Glencoe,
Illinois, advised that the only information in Credit
Bureau Records was dated November, 1959, at which time
a credit inquiry was made in the name of ROBERT and
CLAIRE BORK, 375 Washington, Glencoe, Illinois, and
at the time of the inquiry he was employed as an
attorney and had previously lived at 1362 East
Madison Park. No actual credit information was contained
in the file.

1 - Mr. Cleveland
1 - Mr. Martin
1 - Mr. Caro

January 24, 1973

BY LIAISON

ST
71

Honorable Alexander P. Butterfield
Deputy Assistant to the President
The White House
Washington, D. C.

Photo

CC TO: <i>W. House</i>
REQ. REC'D <i>12/2/80</i>
DEC 5 1980
ANS. BY: <i>[Redacted]</i>

IBS

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Dear Mr. Butterfield:

Reference is made to the letter from this Bureau dated December 26, 1972, which furnished you the results of investigation concerning Mr. Robert Heron Bork.

Referral/Direct

[Redacted Block]

Information has been received indicating the files of the Passport Office, Department of State, contain no additional pertinent information concerning Mr. Bork.

This concludes the investigation in this matter.

Sincerely yours,

Photo

L. Patrick Gray III
L. Patrick Gray III
Acting Director

Photo

CC TO: <i>W. House</i>
REQ. REC'D <i>6-29</i>
JUL 2 1987
ANS. BY: <i>PSY/SY</i>

NOT RECORDED

12 JAN 31 1973

DEC
DEC: vsb
(5)

WNC
WGC

DELIVERED BY LIAISON
ON *1/24/73*

58 FEB 5 1973

MAIL ROOM ☒ TELETYPE UNIT ☐ RETURN TO MR. CARO, ROOM 1254.

- 1 - Miss Smith
- 1 - Mr. Cleveland
- 1 - Mr. Martin
- 1 - Mr. Caro

December 26, 1972

BY LIAISON

Photo

CC TO: Commerce
 REQ. REC'D 3-21-78
 SEP 11 1978
 IS: RE. DD
 BY: RE. DD

Photo encl

REC'D DIS
 FEB 27 1991
 2/27/91/2/13/91
Leifline
White House
release

Photo encl
 CC TO: White House
 REQ. REC'D 6-24
 JUL 2 1987
 ANS: PJL/sy
 BY: PJL/sy

Honorable Alexander P. Butterfield
 Deputy Assistant to the President
 The White House
 Washington, D. C.

Dear Mr. Butterfield:

In accordance with a request received from you on December 11, 1972, an investigation has been conducted concerning Mr. Robert Heron Bork. Transmitted herewith is a summary memorandum containing the results of this investigation.

Information has been received indicating checks of the files of the Internal Revenue Service and the Passport Office, Department of State, have not been completed. When these checks have been completed, you will be advised.

Sincerely yours,
 For the Acting Director

W. Mark Felt
 Acting Associate Director

Photo Encl.
 CC TO: White House
 REQ. REC'D 12-18-80
 DEC 5 1980
 ANS: [Redacted]
 BY: [Redacted]

Enclosure

NOTE: Mr. Bork being considered for Solicitor General of the United States. Request received 12-11-72. Investigation highly favorable and complete except for checks of files of two governmental agencies.

RECORDED
 12 JAN 31 1973

DELIVERED BY LIAISON
 ON 1/27/73

Felt _____
 Baker _____
 Callahan _____
 Cleveland _____
 Conrad _____
 Dalbey _____
 Gebhardt _____
 Jenkins _____
 Marshall _____
 Miller, E.S. _____
 Purvis _____
 Soyars _____
 Walters _____
 Tele. Room _____
 Mr. Kinley _____
 Mr. Armstrong _____
 Ms. Herwig _____
 Mrs. Neenan _____

DEC:vsb
 (6)
 ENCLOSURE
 58 FEB 5 1973

MAIL ROOM ☐ TELETYPE UNIT ☐ RETURN TO MR. CARO, ROOM 1254.

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December 26, 1972

ROBERT HERON BORK - SUMMARY

THE INVESTIGATION OF MR. BORK COVERED INQUIRIES AS TO HIS CHARACTER, LOYALTY, ABILITY, AND GENERAL STANDING, BUT NO INQUIRIES WERE MADE AS TO THE SOURCES OF HIS INCOME.

142 HUNTINGTON ST.
NEW HAVEN, CONN.

I. BIOGRAPHICAL DATA

Birth

Mr. Bork was born on March 1, 1927, at Pittsburgh, Pennsylvania.

Education

Mr. Bork attended the University of Pittsburgh, Pittsburgh, Pennsylvania, during the summer and fall semesters of 1944 through 1945. Exact dates are not available,

CONN.
D.C.
VA.

Mr. Bork attended the University of Chicago, Chicago, Illinois, from January, 1947, to June, 1950, and from June, 1952, to June, 1953. He was awarded a B.A. degree in June, 1948, and a J.D. degree in June, 1953. Mr. Bork completed work on his undergraduate degree while attending the law school.

Employment

June, 1953, to
August, 1954

University of Chicago Law
School, Chicago, Illinois,
as a research associate

September, 1954,
to September,
1955

Wilkie, Farr, Gallagher,
Walton and Fitzgibbons,
attorneys at law, New York,
New York, as an attorney

DEC:vsb

161-920640

ENCLOSURE

MAIL ROOM ☐ TELETYPE UNIT ☐ RETURN TO MR. CARO, ROOM 1254.

Felt _____
Baker _____
Callahan _____
Cleveland _____
Conrad _____
Dalbey _____
Gebhardt _____
Jenkins _____
Marshall _____
Miller, E.S. _____
Purvis _____
Soyars _____
Walters _____
Tele. Room _____
Mr. Kinley _____
Mr. Armstrong _____
Ms. Herwig _____
Mrs. Neenan _____

Robert Heron Bork

**October, 1955, to
June, 1962**

**Kirkland and Ellis,
attorneys at law,
Chicago, Illinois, as
an attorney**

**July, 1962,
to the present**

**Yale University Law
School, New Haven,
Connecticut, as a
professor**

**In addition to his employment Mr. Bork serves as
a trustee or member of the Board of Directors of numerous
educational and legal organizations including:**

**American Enterprise Institution,
Washington, D. C.**

**Woodrow Wilson Center for International
Scholars, Smithsonian Institute, Washington,
D. C.**

**Thomas Jefferson Center Foundation,
University of Virginia, Charlottesville,
Virginia**

Marital Status

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**Mr. Bork is married to the former Claire Sarah
Davidson and they reside at 142 Huntington Street, New Haven,
Connecticut, with their three minor children,**

Military Service

**Mr. Bork enlisted in the United States Marine Corps
Reserve (USMCR), on February 5, 1945, and entered on active
duty on May 7, 1945. He served until October 27, 1946, when
he was honorably discharged as a private first class.**

Robert Heron Bork

Mr. Bork reenlisted in the USMCR on April 22, 1948, and was on inactive duty until May 3, 1949, when he was honorably discharged in order to accept a commission. On that date he accepted a commission in the USMCR as a second lieutenant and entered on active duty on October 5, 1950, and was honorably relieved from active duty on March 22, 1952, as a first lieutenant. Mr. Bork remained in an inactive duty status until December 15, 1958, when he was honorably discharged as a captain.

II. RESULTS OF INVESTIGATION

Interviews

[redacted], Administrative Assistant to Lowell P. Weicker, Jr., United States Senator from Connecticut, advised in Washington, D. C., that Senator Weicker is unavailable for interview and he is authorized to speak for him. Senator Weicker does not know Mr. Bork personally but does know him by reputation as a person of integrity who is highly regarded both personally and professionally. Senator Weicker would recommend Mr. Bork for a position of trust and confidence.

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[redacted] Administrative Assistant to Abraham A. Ribicoff, United States Senator from Connecticut, advised Senator Ribicoff is unavailable for interview and he is authorized to speak for him. Mr. Bork is known personally by Senator Ribicoff and he thinks very highly of Mr. Bork, and would highly recommend him for a position of trust and confidence with the United States Government.

Hammond Chaffetz, senior partner, Kirkland and Ellis, attorneys at law, Chicago, Illinois, advised he recruited Mr. Bork for his firm in 1955. Mr. Chaffetz stated Mr. Bork's work with his firm was primarily in the antitrust field but included other matters. His practice was exclusively in Federal courts and involved no criminal work. He stated Mr. Bork is a brilliant lawyer, an excellent brief writer, and a man of excellent character, personal habits, and loyalty. He advised Mr. Bork helped President Nixon in

Robert Heron Bork

preparing bus legislation, advocating the use of buses under limited circumstances. He termed Mr. Bork a "devil's advocate" in that he liked to explore established legal positions to determine if they were sound. In these instances he often clashed with other legal scholars. He stated that Mr. Bork is intellectually honest and if he is appointed to the position of Solicitor General he will be the lawyer for the Department of Justice and will support the Government's legal position. He added that Mr. Bork belonged to no extremist organizations and held no extremist views. He recommended Mr. Bork highly for the position of Solicitor General.

[redacted], attorney, Chicago, Illinois, advised he has never been in court with Mr. Bork nor witnessed his legal work; however, he has heard speeches by him regarding antitrust matters before various bar associations, has conversed with him, and read some of Mr. Bork's writings. In his opinion Mr. Bork advocates a much more limited and restricted antitrust program. He listed the following recollections of Mr. Bork's contentions:

1. Believes price fixing should be subject to rule of reason and not be held illegal if it can be shown that the agreement does not affect reasonable prices.
2. Believes antimerger cases which have resulted in stopping mergers should be subject to the rule of reason.

[redacted] stated, in short, he believes Mr. Bork contends that present enforcement of antitrust laws is not in the public interest. [redacted] states that Mr. Bork is a man of intelligence, scholarship, sincerity, integrity, and an excellent lawyer; however, he believes him to be out-of-step with most antitrust views in government. He stated Mr. Bork is a perfect choice for Solicitor General from a defense lawyer's point of view. He believes Mr. Bork's present views on antitrust are too extreme for the position of Solicitor General. He said, however, that Mr. Bork's views may moderate if he is appointed.

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Robert Heron Bork

[redacted], Hart, Schaffner, and Marx, Chicago, Illinois, advised he was formerly engaged in antitrust litigation during the period of Mr. Bork's stay in Chicago, Illinois. He stated he never worked with Mr. Bork on a case and his only association with him has been at bar association meetings. He stated Mr. Bork is highly respected as an attorney and that his writings are perceptive and original. He stated Mr. Bork approaches antitrust problems with a fresh view and is able to get to the real issues. [redacted] advised he agrees with Mr. Bork in that many cases the law is not properly applied to the situation. [redacted] believes him to be open-minded with no prejudice for or against business and he is against enforcement of antitrust laws only when applied in the wrong context. He highly recommended Mr. Bork for the position of Solicitor General of the United States.

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M. Joseph Blumenfeld, Chief Judge, United States District Court, Hartford, Connecticut, advised he has known Mr. Bork on a professional basis for the past several years and believes him to be an extremely intelligent man. Judge Blumenfeld advised that Mr. Bork served as a court-appointed master in the reapportionment of the State of Connecticut and he performed this task in an outstanding manner. Judge Blumenfeld advised that he would give Mr. Bork the highest recommendation for the position of Solicitor General of the United States.

Dr. Kingman Brewster, Jr., President of Yale University, New Haven, Connecticut, advised he has known Mr. Bork for a number of years and described him as a valuable member of the Yale faculty. Dr. Brewster described Mr. Bork as honest, courageous, and highly intelligent. He stated Mr. Bork is well known in the Yale community for his scholarly approach, the depth of his research, and his tactfulness and gentlemanly manner. Dr. Brewster advised he knows nothing which might disqualify Mr. Bork from Government employment or which would reflect unfavorably upon his character or reputation. Dr. Brewster gave Mr. Bork his highest endorsement for Government service.

Robert Heron Bork

Dr. William Sloane Coffin, Jr., University Chaplain and Pastor of the Church of Christ, Yale University, New Haven, Connecticut, advised that he has met Mr. Bork on several occasions and it is his belief that Mr. Bork is a very intelligent man and a thoroughly loyal American. Dr. Coffin advised that Mr. Bork is highly respected on the Yale campus for his scholarly ability both as a lawyer and as an instructor. Dr. Coffin freely admitted his personal objection to President Nixon and indicated that he believed Mr. Bork would hold similar views. He advised that his, and Dr. Coffin's, personal political beliefs have been publicly stated on numerous occasions and he did not feel it was necessary to elaborate on them at this time. In conclusion, Dr. Coffin stated that with regard to Mr. Bork's character, loyalty, and reputation, he would have no objection to his employment by the United States Government in a position of sensitivity and trust.

Dr. Eugene V. Rostow, Sterling Professor of Law and Public Affairs, Yale Law School, New Haven, Connecticut, advised he is familiar with Mr. Bork's work at the University of Chicago, in private practice, and at the Yale Law School. Dr. Rostow advised that in 1962 while he was Dean of the Yale Law School, he was instrumental in recruiting Mr. Bork to the Yale Law School faculty. Dr. Rostow advised that he knows Mr. Bork personally and is familiar with his family and business life. He advised that he knows of no derogatory information regarding Mr. Bork's character, or his qualifications for Government employment. Dr. Rostow strongly endorsed Mr. Bork for the position of Solicitor General of the United States.

Abraham S. Goldstein, Dean, Yale Law School, New Haven, Connecticut, advised that he has been Dean of the law school for the past two and a half years and has been on the faculty since 1956. Dean Goldstein advised that he has known Mr. Bork since 1962 and regards him as a close personal friend. Dean Goldstein described Mr. Bork as a man of great principles and integrity, and advised he is a highly regarded and vigorously strong-minded man. Dean Goldstein stated that he has no reason to question Mr. Bork's loyalty and gladly gave his highest recommendation of Mr. Bork for a position of trust and confidence with the United States Government.

Robert Heron Bork

Aaron Director, Scholar in Residence, Stanford Law School, Stanford, California, advised that Mr. Bork is a former student and teaching fellow at the University of Chicago, Chicago, Illinois, under his, Mr. Director's, supervision. Mr. Director advised he has met Mr. Bork's wife and has had occasion to visit in their home. He characterized Mr. Bork and his wife as being of exceptional character and unquestioned loyalty. He described Mr. Bork as being the best student he has ever instructed. Mr. Director concluded by highly recommending Mr. Bork for a position of trust and confidence.

[redacted], New Haven Chapter of the National Association for the Advancement of Colored People, advised that he is not personally acquainted with Mr. Bork, but has seen him on occasion at local civic functions. He said he possesses no information which would preclude him from recommending Mr. Bork for a position of trust and confidence with the United States Government.

Arnold Markle, States Attorney, New Haven County, New Haven, Connecticut, advised that he has known Mr. Bork for the past two years and considers Mr. Bork to be a brilliant scholar who possesses an outstanding legal mind. Mr. Markle stated he has found Mr. Bork to be a fair-minded, honest, and completely trustworthy individual whose appointment to a position with the United States Government would be an asset to the country.

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[redacted]
Hartford, Connecticut, advised that Mr. Bork is unknown to him; however, he is familiar with his reputation in connection with recent efforts to reapportion the State of Connecticut. [redacted] knows of no reason why Mr. Bork should not receive an appointment with the United States Government.

[redacted]
[redacted] leader in the black community, advised that he has only indirect knowledge of Mr. Bork which is based upon the friendship of [redacted] who were formerly classmates at a private preparatory school. [redacted] advised he possesses no information concerning Mr. Bork which would preclude him from a position of trust and confidence with the United States Government.

Robert Heron Bork

Sixty-three additional persons, consisting of professional associates, members of the judiciary, civil rights groups, faculty associates, acquaintances, and neighbors, were interviewed. They stated Mr. Bork is a loyal American citizen whose character, reputation, and associates are above reproach. They highly recommended him for a position of trust and confidence with the United States Government. He was variously described as an extremely intelligent, even-tempered, and articulate individual who possesses a keen mind, commands respect, and is a fine father and husband. Acquaintances of Mr. Bork's close relatives stated they are reputable individuals.

Close Relatives

Mr. Bork has the following close relatives in addition to his wife and three minor children, mentioned previously:

Father	Harry Phillip Bork New Haven, Connecticut
Mother	Elizabeth Mildred Bork New Haven, Connecticut

Credit and Arrest Checks

Information has been received from the appropriate credit reporting agencies indicating their files contain either no record or no additional pertinent information concerning Mr. Bork.

Information has been received from the appropriate law enforcement agencies indicating their files contain no record concerning Mr. Bork or his close relatives.

Bar Affiliations

Mr. Bork is a member in good standing of the American Bar Association. No grievances have been filed against him. He was admitted to practice law in the State of Illinois in August, 1953.

Robert Heron Bork

The records of other appropriate bars and bar associations were checked and they contain no information concerning Mr. Bork.

Agency Checks

Information has been received from the following governmental agencies indicating their files contain either no record or no additional pertinent information concerning Mr. Bork:

Bureau of Personnel Investigations, Civil Service Commission; Defense Central Index of Investigations, Fort Holabird, Maryland; House Committee on Internal Security; United States Secret Service; and The White House Office.

The central files of the FBI, including the files of the Identification Division, contain no additional pertinent information concerning Mr. Bork.

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE ALEXANDRIA	OFFICE OF ORIGIN BUREAU	DATE 12/29/72	INVESTIGATIVE PERIOD 12/27/72
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY SA 	TYPED BY mew
		CHARACTER OF CASE SPECIAL INQUIRY	

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ST
n REFERENCE: Alexandria report of SA 12/19/72.

-RUC-

ADMINISTRATIVE:

Three copies of report being designated for the Bureau per previous Bureau instructions.

of

ACCOMPLISHMENTS CLAIMED						☐ NONE	ACQUIT-TALS	CASE HAS BEEN:
CONVIC.	AUTO.	FUG.	FINES	SAVINGS	RECOVERIES			
								PENDING OVER ONE YEAR ☐ YES ☐ NO
								PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☐ NO

APPROVED <i>CB</i>	SPECIAL AGENT IN CHARGE	DO NOT WRITE IN SPACES BELOW	
COPIES MADE: <i>20</i> ③-Bureau 1-Alexandria (161-1875)		161-9206-42	
		NOT RECORDED	
		JAN 3 1973	

Dissemination Record of Attached Report				Notations <i>Spec. Inq.</i>
Agency				
Request Recd.	one cc Deputy A.G.			
Date Fwd.	JAN 3 1973			
How Fwd.				
By	58 FEB 5 1973			

-A*-

COVER PAGE

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to:

Report of:
Date:SA [REDACTED]
12/29/72

Office: Alexandria, Virginia

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Field Office File #:

161-1875

Bureau File #:

Title:

ROBERT HERON BORK

Character:

SPECIAL INQUIRY

Synopsis:

No pertinent identifiable information in the files
[REDACTED] concerning BORK.

-RUC-

b6

b7C

Referral/Consult

DETAILS:[REDACTED]
SA [REDACTED] caused a search to be made of
the files of [REDACTED] and was advised on December 27, 1972, that
[REDACTED]

-1*-

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE WASHINGTON FIELD	OFFICE OF ORIGIN BUREAU	DATE 12/29/72	INVESTIGATIVE PERIOD 12/13-29/72
TITLE OF CASE ROBERT HERON BORK		REPORT MADE BY SA 	TYPED BY nrc
		CHARACTER OF CASE SPIN	

b6
b7CREFERENCE: Bureau teletype to WFO, 12/11/72.

-P-

LEAD: WFO
State Passport

Page 5.

of

ACCOMPLISHMENTS CLAIMED					☐ NONE	ACQUIT- TALS	CASE HAS BEEN: PENDING OVER ONE YEAR ☐ YES ☐ NO PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☐ NO
CONVIC.	FUG.	FINES	SAVINGS	RECOVERIES			
APPROVED <i>M/EN</i>						SPECIAL AGENT IN CHARGE	
COPIES MADE: ③ Bureau 1-WFO (161-8634)						DO NOT WRITE IN SPACES BELOW 161-9206-43 NOT RECORDED 12 JAN 31 1973	
Dissemination Record of Attached Report						Notations	
Agency	one cc Deputy AG					Spec Inq.	
Request Recd.							
Date Fwd.	JAN 3 1973						
How Fwd.	58 FEB 5 1973						
By							

COVER PAGE

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to:

Report of:

Date:

12/29/72

Office: Washington, D.C.

b6
b7C

Field Office File #: 161-8634

Bureau File #:

Title:

ROBERT HERON BORK

Character:

SPECIAL INQUIRY

Synopsis:

No record for the appointee at the Personnel Office, White House Office. Files of the Records Office, White House Office reflect the fact that the appointee was appointed as a member of the Board of Trustees, Woodrow Wilson International Center for Scholars, Smithsonian Institution, on November 2, 1972. The term of Commission expiring in October, 1978. Association with the American Enterprise Institute and the Smithsonian Institution set forth. References highly recommend. No record Credit Bureau. No record police agencies. No record HCIS or CSC. No record Supreme Court of the United States. No record Committee on Grievances or Bar Associations.

-P-

DETAILS: AT WASHINGTON, D.C.

F B I

Date: 12/29/72

Transmit the following in _____
(Type in plaintext or code)Via AIRTEL _____
(Priority)

TO: ACTING DIRECTOR, FBI

FROM: SAC, WFO (161-8634)(P)

ROBERT HERON BORK

SPECIAL INQUIRY

BUDED: 12/18/72 Without Fail

Re WFO airtel to Bureau, 12/18/72; Chicago teletype to Bureau,
12/19/72.LEAD: WFO
State Passport44
NOT RECORDED
12 JAN 31 19731-Bureau
1-WFO (161-8634) 137
(2) 58 FEB 5 1973
RMS:nrc

Spec. Inq.

Agent in Charge

Sent _____ M Per _____

WFO 161-8634

JE:nsw

1

REFERENCE

The following investigation was conducted by
SA [REDACTED]:

b6
b7C

ALAN S. WARD, former Chairman, Federal Trade Commission, Washington, D. C., was contacted on December 20, 1972, and he advised that he was not personally acquainted with the appointee, and was only able to comment regarding his professional capabilities through his readings of various briefs and articles written by the appointee.

He stated that the appointee is a respected speaker and legal advocate, being regarded as a "traditionalist" in the anti-trust field. It is his impression that BORK advocates strong enforcement of the Sherman Act with regards to cartels and horizontal mergers, although he is less than an advocate of a "very broad" enforcement of the Clayton Act, being more lenient of vertical mergers and conglomerates. It was his impression that Mr. BORK feels that certain types of mergers do not restrict competition.

He further advised that BORK is well-known for his ability as a teacher and scholar and is highly regarded in the legal profession.

Mr. ALAN WARD highly recommend the appointee for a position and responsibility in the United States Government.

WFO 161-8634

RMS:nrc

1

On December 29, 1972, [redacted] Attorney,
[redacted], Washington, D.C. advised SA [redacted]
that he has never met the appointee personally and knows of his
name only through writings of the appointee. [redacted] has never
been Chairman of the Federal Trade Commission nor has he ever been
connected with government service. He has at times been before
the Federal Trade Commission in his capacity as an attorney repre-
senting various clients but that has been the extent of association
with the Commission. Due to the fact that he has never met the
appointee he did not feel qualified to make a judgement concerning
the appointee's character or qualifications.

b6

b7C

MAILED

1 - AG Folder

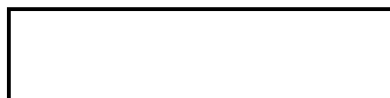
OCT 26 1973

NAME CHECK

October 26, 1973

REC-28 161-9206-45

EX-105



Captioned individuals, who you advised reside at South Daytona, Florida, and Baton Rouge, Louisiana, respectively, have not been the subjects of an investigation conducted by this Bureau.

Our files, however, reveal that [redacted] requested an autograph photograph of the late Director Hoover in 1971. Our Jacksonville Office determined he was born in 1945 and was arrested three times for not carrying his driver's license, although he had one at his home. He was also arrested for having horses within city limits. As [redacted] was considered to be something of a character while involved in local city politics, his request for the autograph was denied.

(62-114664)

The central files of the FBI, including the files of the Identification Division, contain no additional pertinent information concerning [redacted] and no information identifiable with [redacted] based upon background information submitted in connection with this name check request.

b6
b7C

Original and 1 - Horace Webb, Director, Public Information, Attention: [redacted], by 0-6 (D).

EJK:yscpl(4)

Assoc. Dir. _____
Asst. Dir. _____
Admin. _____
Comp. Syst. _____
Ext. Affairs _____
Files & Com. _____
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory _____
Plan. & Eval. _____
Spec. Inv. _____
Training _____
Legal Coun. _____
Telephone Rm. _____
Director Sec'y _____

NOV 12 1973

43

DP
[Handwritten signature/initials]
gwb/...

MAIL ROOM ☐

TELETYPE UNIT ☐

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : J. W. Brown
FBI

DATE: October 18, 1973

FROM : Horace S. Webb *How*
Deputy Director of Public Information

SUBJECT: Requests for autographed photographs of Attorney General

The following persons have requested autographed photographs of the Attorney General. Please do name checks and forward any information to [redacted] in my office.

[redacted]
S. Daytona, Florida 32019

[redacted]
Baton Rouge, Louisiana 70811

b6
b7C

Robert A. Bork

Q

CHMB AG by 0-6

[redacted]

10-26-73

REC-28

161-9206-45

931 3/1 1973

NAME CHECK *Quth*

Federal Bureau of Investigation
Records Section10/19, 1975

- ☐ Name Searching Unit - Room 6527
☐ Service Unit - Room 6524
☐ Forward to File Room
☐ Attention
☐ Return to **H13-18**

Supervisor _____ Room _____ Ext. _____

Type of References Requested:

- ☐ Regular Request (Analytical Search)
☒ All References (Subversive & Nonsubversive)
☐ Subversive References Only
☐ Nonsubversive References Only
☐ Main _____ References Only

b6
b7C

Type of Search Requested:

- ☐ Restricted to Locality of _____
☐ Exact Name Only (On the Nose)
☐ Buildup ☐ Variations

Subject

Birthdate & Place _____

Address _____

Localities _____

R# _____

Date 10/19Searcher
Initials 01

Prod. _____

FILE NUMBER

SERIAL

62 - 114664 I

Federal Bureau of Investigation
Records Section10/19, 1923

- ☐ Name Searching Unit - Room 6527
☐ Service Unit - Room 6524
☐ Forward to File Review
☐ Attention _____
☐ Return to _____

Supervisor Room Ext.

Type of References Requested:

- ☐ Regular Request (Analytical Search)
☒ All References (Subversive & Nonsubversive)
☐ Subversive References Only
☐ Nonsubversive References Only
☐ Main _____ References Only

Type of Search Requested:

- ☐ Restricted to Locality of _____
☐ Exact Name Only (On the Nose)
☐ Buildup ☐ Variations

Subject

Birthdate & Place

Address

Localities

R#

Date

Searcher

Initials

Prod.

FILE NUMBER

SERIAL

b6

b7C

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT

TO : HEADS OF DIVISIONS, BUREAUS,
BOARDS AND SERVICES

Date: November 21, 1973

FROM : John W. Hushen *JWH*
Director of Public Information

SUBJECT: Appearance of Acting Attorney General Robert H. Bork on
"Face the Nation"

Assoc. Dir.	☒
Asst. Dir.	☒
Adm.	☒
Gen. Inv.	☒
Ext. Affairs	☒
Files & Com.	☒
Gen. Inv.	☒
Ident.	☒
Intell.	☒
Laboratory	☒
Plan. & Eval.	☒
Spec. Inv.	☒
Training	☒
Legal Coun.	☒
Telephone Rm.	☒
Director Sec'y	☒

Acting Attorney General Bork will appear on the CBS-TV
program, "Face the Nation" at 11:30 A.M., Sunday. " / "

Please alert your assistants and have them alert their
staff members.

EX-105

REC-56

161-9206-46

NOV 21 1973

43
56 NOV 28 1973

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. Callahan

DATE: 11/12/73

FROM : R.R.Franck *RRF*

SUBJECT: "FACE THE NATION"
WTOP-TV (CHANNEL 9)
11:30 A.M.
APPEARANCE OF ACTING ATTORNEY GENERAL
ROBERT H. BORK

Asst. Dir.
Admin.
Comp. Syst.
Ext. Affairs
Files & Com.
Gen. Inv.
Ident.
Inspection
Intell.
Laboratory
Plan. & Eval.
Spec. Inv.
Training
Legal Coun.
Telephone Rm.
Director Sec'y

b6
b7C

As a consequence of Acting Attorney General Bork's appearance on captioned program yesterday morning, [redacted], CBS reporter, telephonically contacted SA [redacted] who was handling telephone calls for my Division for the weekend. [redacted] advised that in connection with his appearance on "Face The Nation" Bork denied that the FBI had been given authority to seal then Attorney General Richardson's and Deputy Attorney General Ruckelshaus' offices on the evening of 10/20/73.

[redacted] indicated that Bork said that he was in General Haig's office at the White House when the General called Mr. Kelley to order that the FBI seal Cox's office. According to [redacted], Bork further stated that no orders were given for the FBI to seal Richardson's and Ruckelshaus' offices. Bork indicated that when he arrived at the Justice Department the following morning he found out that the FBI had sealed the former Attorney General's and Deputy Attorney General's offices and he immediately called Haig to determine why this had been done.

[redacted] indicated that Bork said that Haig denied having issued such instructions and that he told Bork that he would immediately instruct the FBI to remove this security, and it was removed.

[redacted], referring to the entire matter as the "Saturday night massacre by President Nixon," wanted to know specifically who issued the orders to have Richardson's and Ruckelshaus' offices sealed off. He was advised that we were standing on our statement made on the evening of 10/20/73 that the FBI had responded to orders received from the White House to secure the offices of Cox, Richardson and Ruckelshaus to insure the security of the official documents being maintained there.

Enclosure

ENCLOSURE

- 1 - Mr. E.S. Miller - Enc.
- 1 - Mr. Callahan - Enc.
- 1 - Mr. Gebhardt - Enc.
- 1 - Mr. Franck - Enc.

GTO:jo
(6)

51 NOV 28 1973

(CONTINUED-OVER)

161-9246-

NOT RECORDED

170 NOV 27 1973

ORIGINAL FILED IN 62-115631-52

Franck to Callahan memo (continued)
Re: "FACE THE NATION"

At 6:35 p.m. yesterday evening, [] again called and advised that CBS had contacted the White House and spoke with [] of [] office, and was advised by [] that General Haig's orders on the evening of 10/20/73 were issued with respect to the sealing of Cox's office and not those of Richardson and Ruckelshaus. [] was advised that the FBI still stands on its original statement in connection with this entire matter.

This matter was discussed with Deputy Associate Director Miller and he concurred with our position that we make no further comment and that we stand on our original statement which was made in response to news inquiries on the evening of 10/20/73.

[] advised that newsman [], CBS News, over TV station WTOP shown locally at 11 p.m. would feature this matter. This portion of the news broadcast was taped and a transcript is attached.

RECOMMENDATION:

For information.

97Q
HLS
[Signature]
EM

[Signature]

b6
b7C

Assoc. Dir. ☒
 Asst. Dir.:
 Admin. ☒
 Comp. Syst. ☒
 Ext. Affairs ☒
 Files & Com. ☒
 Gen. Inv. ☒
 Ident. ☒
 Inspection ☐
 Intell. ☐
 Laboratory ☐
 Plan. & Eval. ☐
 Spec. Inv. ☐
 Training ☐
 Legal Coun. ☐
 Telephone Rm. ☐
 Director Sec'y ☐

052A

BORK 11-12

WASHINGTON (UPI) -- ACTING ATTORNEY GENERAL ROBERT H. BORK SAYS HE IS "MORALLY CERTAIN" PRESIDENT NIXON WOULD NOT FIRE LEON JAWORSKI, THE SECOND WATERGATE SPECIAL PROSECUTOR.

BUT BORK, WHO CARRIED OUT THE DISMISSAL LAST MONTH OF ARCHIBALD COX FROM THE POST, SAID HE WOULD BE FIRED FIRST RATHER THAN DISMISS JAWORSKI.

"I DON'T REGARD THAT AS EVEN A POSSIBILITY, BUT THAT IS A COMMITMENT IF IT SHOULD BECOME A POSSIBILITY," HE SAID SUNDAY.

BORK APPEARED ON CBS' "FACE THE NATION."

HE ALSO SAID HE WOULD ADVISE NIXON TO VETO PENDING LEGISLATION CREATING A COURT-APPOINTED SPECIAL PROSECUTOR "BECAUSE I REGARD IT AS A BASIC AND TRAGIC DEPARTURE FROM THE SYSTEM OF OUR GOVERNMENT SET UP BY THE CONSTITUTION."

A PERMANENT SPECIAL PROSECUTION FORCE, AS SUGGESTED BY SOME, "WOULD BE AN INSTITUTIONALIZED WOLF ON THE FLANKS OF THE EXECUTIVE DEPARTMENT," HE SAID.

"HOW WOULD YOU LIKE AN INSTITUTIONALIZED PERSON ... WHOSE SOLE DUTY IS TO INVESTIGATE AND INDICT THE EXECUTIVE DEPARTMENT, AND ANOTHER ONE FOR THE CONGRESS AND ANOTHER ONE FOR THE COURTS?" BORK ASKED. "NOBODY WOULD GET ANY WORK DONE."

ASKED IF HE WOULD RISK GETTING FIRED IF HE REFUSED TO DISMISS JAWORSKI, BORK REPLIED, "THAT'S RIGHT." BUT HE ADDED, "I AM MORALLY CERTAIN THAT FOR A VARIETY OF REASONS, THE PRESIDENT WILL NOT FIRE MR. JAWORSKI."

BORK SAID IT WAS NIXON'S CHIEF OF STAFF, ALEXANDER M. HAIG, WHO ORDERED THE FBI TO SEAL THE PROSECUTOR'S OFFICES THE NIGHT OF OCT. 20 WHEN COX WAS FIRED.

BORK, WHO FIRED COX AFTER TAKING OVER AS ACTING ATTORNEY GENERAL FOLLOWING THE RESIGNATIONS OF FORMER ATTORNEY GENERAL ELLIOT L. RICHARDSON AND HIS DEPUTY WILLIAM D. RUCKELSHAUS, SAID THE FBI TOOK CONTROL OF SPECIAL PROSECUTOR'S OFFICE BECAUSE "WE WERE ALL UNCERTAIN ABOUT THE EFFECT OF WHAT HAD TAKEN PLACE."

BORK ALSO SAID THAT THE FBI SEALING OF JUSTICE DEPARTMENT OFFICES OF RICHARDSON AND RUCKELSHAUS WERE NOT AUTHORIZED. "THAT MUST HAVE BEEN A FAILURE OF COMMUNICATIONS SOMEWHERE," BORK SAID.

UPI 11-12 06:13 AIS

58 NOV 1 6 13 AM WASHINGTON CAPITAL NEWS SERVICE

170 NOV 14 1973

The Man Who Fired Archibald Cox

By Joel Dreyfuss

Robert Heron Bork, Jr., 46, is understandably at a loss when asked to compare the pressures of recent weeks with another period in his life. All else seems to pale before the events that began on Oct. 22, when he was wrenched from the relative obscurity of the post of United States Solicitor General and thrust into the national spotlight.

He thinks back to the time—only a few months ago—on the Yale campus when he was a conservative law professor in a sea of liberals, taking Nixonian Republican positions although he had not yet been granted tenure.

"At the time," he says, "those events seemed large."

But how can they compare to the resignations of Elliot Richardson and William French Smith, the sudden elevation of Bork to the post of acting Attorney General and his decision to follow President Nixon's order to fire Watergate prosecutor Archibald Cox?

"The degree of anxiety has declined," admits Bork, who selected Leon Jaworski to replace Cox and who must now wait until Congress acts on the nomination of Sen. William B. Saxton as Attorney General.

On the evening of the interview it is raining outside the Bork house. "It's the first night in days he's been home before 11 o'clock," explains Mrs. Bork, who sits near him on the edge of a sofa. He has shed his jacket, opened his collar and sips a drink, worrying that the photographer will give the world an unfavorable impression of his habits.

The house still has that "just-moved-in" look. The furniture is nondescript but utilitarian. Relief is provided by metal sculptures by his 18-year-old son, Robert, who is at Carlton College in Minnesota. On the wall are brass rubbings by his wife, Claire, done during his sabbatical in England. There are two other children, Charles, 13, and Ellen, 12, who attend public schools in McLean.

At this point he can afford to look back and recall that Saturday when he was in the Justice Department working on the appeal recommendation in the Watergate tapes case. He stopped writing a letter to a 3rd-grade class on the importance of Bill of Rights Day to listen to Cox's news conference.

He was then called to Richardson's office for a dis-

cussion of possible plans to discharge Cox. "It hadn't really occurred to me what this kind of development meant until late that afternoon."

Because he was not bound by the other two men's commitment to the Senate, Bork decided he could fire Cox. But he also thought of resigning.

"I was thinking of resigning not out of moral considerations," he says, but out of selfish motives. "I did not want to be perceived as a man who did the President's bidding to save my job."

Richardson and Ruckelshaus persuaded him to stay to prevent the Justice Department from falling apart. "I realized there wouldn't be a presidential appointee in the place."

These were his thoughts, but in the eyes of some he became the hatchet man willing to carry out an order others would not perform. "I've had some time to think about it since," he says. "I think I did the right thing."

That answer would hardly surprise anyone who knows Robert Bork, son of a Pittsburgh steel mill employee. "My mother was Pennsylvania Dutch, my father was half-German, half-Irish."

"He still is," interjects Claire Bork, a native of New York, pointing out that Bork's parents are both alive and, in fact, have just moved nearby.

"You're being very lawyerlike tonight," he notes wryly. Mrs. Bork smiles, not the least bit intimidated by the 6-foot, 200-pound red-bearded man several feet away. She breaks in often during the conversation to make a point or to introduce a topic.

"My parents had relatively little influence on my life," says Bork, dismissing further discussion of his family.

Life begins, in a sense, on the campus of the University of Chicago in 1947, where Bork was one of the many war veterans enrolling at the college.

(He had enrolled in the

Assoc. Dir. _____
Asst. Dir.: _____
Admin. _____
Comp. Syst. _____
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Spec. Inv. _____
Training _____
Legal Coun. _____
Telephone Rm. _____
Director Sec'y _____

161-9206-A
NOT RECORDED

2 NOV 8 1973

The Washington Post Times Herald B-1
The Evening Star (Washington) _____
The Sunday Star (Washington) _____
Daily News (New York) _____
Sunday News (New York) _____
New York Post _____
The New York Times _____
The Daily World _____
The New Leader _____
The Wall Street Journal _____
The National Observer _____
People's World _____

Date 11/6/73

9-7-73
File
161-9206

57 NOV - 8 1973

47

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b7C

Marines just after he graduated from high school, but the war ended before he saw action.

"I had been a left-wing kid," said Bork. "I always had thought the left wing had the best arguments."

Bork met Claire Davidson the first day of classes but didn't see her again for a couple of years. "Bob had been a Marine and I was 17. It was very exciting," Mrs. Bork recalls. "You couldn't walk across campus without running into 10 groups all engaged in discussion. They were really intense."

The undergraduate years hadn't changed Bork much politically, it seems. "I went to law school wanting to be a labor union lawyer."

Marvin Chirelstein, who is now on the Yale Law faculty, met Bork at the University of Chicago Law School.

"He began as a garden variety liberal. Over a period he came under the influence of some very strong conservative thinkers," said Chirelstein. "He plunged into that and persuaded himself that he was a classical conservative. Over the years, he's become less dogmatic."

The key figure in Bork's political metamorphosis was Aaron Director who taught Bork a course in economics at Chicago. Bork recalls having his pat. liberal arguments devastated by Director's logic and he gradually embraced his views.

My first election (when he could vote) I was for Truman," he said. "In my second election, Claire and I went out and worked for Adlai Stevenson." His views began to change after that.

After another stint in the Marines—he was a reserve lieutenant called up during the Korean war—Bork worked for a couple of law firms, first in New York,

then back in Chicago between 1954 and 1962.

"After awhile I saw I was going to be doing the same thing for 35 years for more money," Bork says. "I used to ride the commuter train in the morning and as Chicago got closer I would have a sense of despair."

He joined the Yale faculty in 1962 and stayed there until this June when he took a two-year leave of absence to become Solicitor General.

He was probably hired as a sort of token conservative but soon flowered into a prominent voice fond of criticizing "liberals." (He loves to put quotes around the description.) There was an article in the New Republic in June, 1968, "Why I am for Nixon" an attack on Earl Warren's court in Fortune magazine that same year; in Fortune the next year, an attack on the administration's antitrust policies as too removed from the philosophy of the "open market and free competition."

In October of last year he was one of 45 academic figures who endorsed Richard Nixon in a full-page New York Times advertisement. He also helped draft the President's antibusing position last year.

Bork's Yale associates go to great lengths to separate their opinions of Bork the man, from their opinions of Bork, the law professor.

"I find him a lovely man," says Yale law professor Alexander Bickel, who disagrees with Bork on most issues. "I've always thought that when a man has made a decision that involves moral considerations and takes the difficult course he is two-thirds of the way home. The easy thing for him to do would have been to follow Richardson."

The recurrent adjective attached to Bork's name is "strong."

"I've never noticed him to flinch," says Bickel. "He's a strong man but he's not an insensitive man by any means."

His old friend Chirelstein, musing on the decision to fire Cox: "One of the most notable things about him is he has considerable trust in his tendency to do the right thing. His willingness to trust himself has grown over the years. He's gone from success to success."

Yale law school colleague Clyde Summers offered another theory on the Cox firing.

"I thought Bork might have been moved by his loyalty to the administration, much like the loyalty a man might feel toward an adulterous wife."

In a sense, then, his years at Yale and his political positions have served his as trials by fire. He was not always liked, but was always respected.

When he left Yale, another associate recalls, Bork was presented with a hard hat by his students. "It was a marvelous statement of affection and courteous disagreement," said Prof. Louis Pollak.

The picture one draws from various members of

the Yale faculty is that Bork is also a bit far idealist.

"Aren't you going to ask about the beard?" queries Chirelstein. "One reporter wanted to know if it was a hippie beard. It's a ship captain's beard. He's to be seen on the deck giving firm orders to the men below with his eyes firmly set on the horizon."

Bork, the father, contends it's much less than symbolic.

The beard is the 40-year-old daughter's responsibility. I had trouble shaving for six or seven days and it began to look good. The only time I'll shave now is when I want to disguise myself."

He may have wanted to do that a few times in recent days. There were no pleasant telephone calls after the firing of Cox (he had his number changed) and a load of hate mail (he hasn't had time to see it). There were also favorable calls and telegrams.

Now he's waiting for the spotlight to shift away so he can return to his old (four months) job. "It combines the best of academia and the best of government. And besides, I've thought a great deal about arguing before the Supreme Court."

Bork says he borrowed a formal vest and tail for an argument a couple of months ago. The garment was a bit too tight. "I gave me a certain tension in my voice as I spoke."

After all the attention and the political tightrope walking he's engaged in during the past few weeks, some wonder if Bork can really return to the relatively less position he held in the department.

The descriptions of Bork attach "ambition" to "strength" and some say he is being groomed by Mr. Nixon for the Supreme Court, where he would be the next "strict constructionist."

Chirelstein says Bork left his law practice for more than just boredom. "He felt that what he wanted to do was to be a great man."

The Borks must then sit and wait. Mrs. Bork complains they haven't had a chance to really see Washington. Haven't they done the cocktail party tour? "Not really," Bork answers, "can you get us invited to some?"

Five Justice Department Nominations Are Cleared by Senate Committee

By John MacKenzie
Washington Post Staff Writer

The Senate Judiciary Committee approved five high-ranking Justice Department nominations yesterday after Northern and Southern members grilled J. Stanley Pottinger, the choice for chief of the civil rights division.

Speedy confirmation by the full Senate is expected for Pottinger and other principal officers of the department under the second Nixon administration.

Also cleared were:

• Joseph Sneed, dean of Duke Law School, as deputy attorney general.

• Robert H. Bork, Yale law professor, as solicitor general, the government's top Supreme Court advocate, to be sworn in when the court's term ends in June.

• Robert G. Dixon Jr., as assistant attorney general for legal counsel, to be sworn in af-

ter he argues a key reapportionment case in the Supreme Court next month on behalf of Republican members of the Connecticut Legislature. Dixon teaches law at George Washington University.

• James D. McKevitt, as assistant attorney general for congressional relations. McKevitt was a Republican representative from Colorado for one term who lost his bid for re-election last fall.

Pottinger, head of the office of civil rights at the Department of Health, Education and Welfare since 1970, was questioned by Sen. Phillip A. Hart (D-Mich.) about alleged foot-dragging at HEW, and by Chairman James O. Eastland (D-Miss.), who accused the nominee of enforcing civil rights in the South only.

Hart asked Pottinger to explain a Nov. 16 decision by U.S. District Judge John H. Pratt here which found HEW's civil rights office lax in cut-

ting off federal funds from school districts that didn't meet desegregation standards.

The nominee told Hart he respectfully disagreed with the court's judgment and was working to rectify what he called mistakes in the evidence. He said he was restrained from commenting extensively on the litigation, noting that HEW lawyers are still working on a final order involving fund cutoffs to as many as 42 districts.

Judge Pratt had criticized Pottinger and other HEW officials for the longstanding freeze on fund cutoffs and for failure to monitor the performance of school districts which were under court orders to desegregate. The judge said only a token number of enforcement actions had been started since 1971 and no funds cut off since the summer of 1970.

Felt _____
Baker _____
Callahan _____
Cleveland _____
Conrad _____
Dalbey _____
Gebhardt _____
Jenkins _____
Marshall _____
Miller, E.S. _____
Purvis _____
Soyars _____
Walters _____
Tele. Room _____
Mr. Kinley _____
Mr. Armstrong _____
Ms. Herwig _____
Mrs. Neenan _____

The Washington Post Times Herald A-2
The Evening Star (Washington) _____
The Sunday Star (Washington) _____
Daily News (New York) _____
Sunday News (New York) _____
New York Post _____
The New York Times _____
The Daily World _____
The New Leader _____
The Wall Street Journal _____
The National Observer _____
People's World _____

Date 1/31/73

161-9206-A-
NOT RECORDED
45 FEB 15 1973 9-881

58 FEB 16 1973

file
161-9206
Mr. Bork

Felt _____
 Baker _____
 Bishop _____
 Callahan _____
 Cleveland *CF* _____
 Conrad _____
 Dalbey _____
 Gebhardt _____
 Jenkins _____
 Marshall _____
 Miller, E.S. _____
 Purvis _____
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 Walters _____
 Tele. Room _____
 Mr. Kinley _____
 Mr. Armstrong _____
 Ms. Herwig _____
 Mrs. Neenan _____

Conservative Leanings Mark Choice for Solicitor General

By FRED BARNES
 Star-News Staff Writer

President Nixon has selected as the administration's chief advocate before the Supreme Court an antitrust specialist from Yale University law school with strong conservative leanings.

Robert H. Bork, 45, who teaches both antitrust and constitutional law at Yale, will become solicitor general when Erwin N. Griswold retires next summer.

Nixon announced Bork's appointment yesterday, and the professor traveled later to Camp David, Md., to meet with the President at his mountaintop retreat.

The President also disclosed that Richard G. Kleindienst will remain as attorney general in the reshuffled Cabinet, but with a new deputy and two new assistant attorneys general — still to be appointed — in addition to the new solicitor general.

The job of solicitor general is a prestigious and important one. In the post, Bork will de-

cide which cases the government appeals to the high court, shape the legal grounds on which they are based and perhaps argue some of them himself.

The Supreme Court has traditionally been receptive to government appeals, and it also lends a sensitive ear to

the solicitor general's position in cases in which the government is not one of the formal litigants.

Bork has been closely associated with the Nixon administration in recent years. Among his links are:

• In the period when the President was experiencing trouble in putting his choices on the Supreme Court, Bork came forward with a vigorous endorsement of William H. Rehnquist, who was subsequently confirmed by the Senate as a justice.

• He was one of the few legal scholars in the country to publicly support President Nixon's anti-busing legislation, which includes a moratorium on court-ordered busing for desegregation, as constitutionally sound.

• Bork authored an article in the New Republic, the liberal journal, in June 1968 entitled "Why I Am For Nixon." He said that Nixon represents "the political philosophy of classical liberalism," and he identified himself with that philosophy.

The Yale professor is so closely identified with Nixon's judicial philosophy that his appointment created some speculation that the President may be grooming him for the next vacancy on the Supreme Court.

The Washington Post _____
 Times Herald _____
 The Evening Star (Washington) *A2* _____
 The Sunday Star (Washington) _____
 Daily News (New York) _____
 Sunday News (New York) _____
 New York Post _____
 The New York Times _____
 The Daily World _____
 The New Leader _____
 The Wall Street Journal _____
 The National Observer _____
 People's World _____

DEC 9 1972

Date _____

161-9206-A -

NOT RECORDED

49 FEB 5 1973

*file 161-9206-
 m*

137
 70 FEB 6 1973

b6
 b7C

Role of Legislative

But Bork has been critical of some aspects of the administration's approach to the law. In a 1969 magazine article, he unbraided the Justice Department for waging an antitrust battle against conglomerates, saying it should instead "concentrate on a drive against price fixing, market collusion and cartels."

Bork is a proponent of judicial restraint, believing that the courts — and particularly the Supreme Court — should leave many matters to the legislative branch to resolve.

In the 1969 article, he noted that the high court is faced with suits "seeking judicial determination of abortion statutes, the death penalty, environmental issues, the rights of women and the Vietnam war."

"The court should refer many of these issues to the political process," he said, "even though it will anger those who have been taught to hope for easier, more authoritarian solutions."

Chicago Practice

Bork was born in Pittsburgh, earned a bachelor's degree at the University of Pittsburgh and received his law degree at University of Chicago.

Before joining the Yale law faculty in 1962, he practiced law in Chicago for 10 years, specializing in the antitrust field.

Bork's appointment is subject to Senate confirmation, but nominees for solicitor general rarely face stiff opposition.



ROBERT H. BORK

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. Wafsb

FROM : R. G. Hunsinger *RGH*

SUBJECT: ROBERT H. BORK
SOLICITOR GENERAL

DATE: 8-1-74

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.: _____
Adm. _____
Comp. Syst. _____
Ext. Affairs _____
Files & Com. _____
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory _____
Plan. & Eval. _____
Spec. Inv. _____
Training _____
Legal Coun. _____
Telephone Rm. _____
Director Sec'y _____

Ja

The secretary to Mr. Bork telephonically contacted the Personnel Office to advise that, in connection with his application for admission to the bar of the District of Columbia Court of Appeals, Mr. Bork is hard-pressed to recall many of the dates and addresses attendant to his personal history background for inclusion on the application. Accordingly, he would appreciate the Bureau referring to whatever personal history source material it has on him stemming from Bureau applicant-type investigations to develop some or all of the information needed. The secretary sent over a copy of the application, and it is true it calls for information that many people who have had several moves would be hard-pressed to recall. For instance, the application asks for the addresses of every residence the applicant has had since the age of 16 including dates.

During late 1972 and early 1973 the Bureau conducted a special inquiry investigation on Mr. Bork, and it is probable that some of the information developed would be of assistance to him in filling out personal history information.

RECOMMENDATION:

Using the application Mr. Bork must execute as a guideline, it is recommended that we go forward and informally fill out as much as we can based on information available to the Bureau from his file.

1 - ☐
1 - ☐
RGH:slz
(4) *AB*

*Hand Delivered
to MR BORKS
SEC 8-6-74
JPS*

*Solicitor's office
furnished confirmation
of above information
per request of Solicitor
on 8/6/76
Rul*

REC-60

161-9206-47

AUG 9 1974

51 AUG 19 1974

7202

[Signature]

June 18, 1975

ADG
Mrs. Robert H. Bork
1007 Turkey Run Road
McLean, Virginia, 22101

Dear Mrs. Bork:

D.C.

ROBERT H. BORK

Enclosed is a copy of the photograph
taken on May 28th when you and the other Department
of Justice Wives' toured FBI Headquarters. I am
sorry that I was not in town at the time as it
would have been my pleasure to meet with the entire
group. I trust that your visit was an enjoyable one.

Sincerely,

Clarence Kelley

Enclosure

1 -

JCW:mls (4)

mls

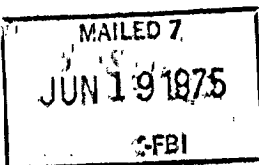
ST-117

REC-16

161-9206-48

5 JUN 20 1975

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Dep. AD Inv.
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Intell.
Laboratory
Plan. & Eval.
Spec. Inv.
Training
Legal Coun.
Telephone Rm.
Director Sec'y



JUL 22 1975

MAIL ROOM ☒

TELETYPE UNIT ☐

APC

133 m/gm

*GEN
JCW*

AKC

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. Jenkins

DATE: 9-4-75

FROM : E. W. Walsh *EW*

SUBJECT: REQUEST OF SOLICITOR GENERAL ROBERT H. BORK
TO USE DIRECTOR'S DINING ROOM ANY DAY DURING
WEEK OF 9-22-75 THROUGH 9-26-75

Assoc. Dir. _____
Dep. Asst. Dir. _____
Dep. AD Inv. _____
Asst. Dir. _____
Admin. _____
Comp. Syst. _____
Ext. Affairs _____
Files & Com. _____
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory _____
Plan. & Eval. _____
Spec. Inv. _____
Training _____
Legal Coun. _____
Telephone Rm. _____
Director Sec'y _____

187-2201

[redacted] telephoned my office this morning. She stated that Solicitor General Bork customarily hosted a luncheon each year for his staff of about 19 people. In the past this was held in the Attorney General's dining room, but Attorney General's dining room is too small to accommodate his entire staff. The Solicitor General wondered if Director Kelley would be kind enough to make available to him and his staff the use of the Director's dining room any day during the week of September 22 through September 26.

Director Kelley's schedule indicates that on 9-24-75 he will be in Wilmington, Delaware, in connection with the Crime Resistance Program, and on 9-25-75 he will be at Quantico to attend the National Academy graduation. *b6 b7C*

The Director's absence from the office on 9-24-75 and 9-25-75 will certainly be known to the Department. While the use of our facilities by the Department may be considered precedent setting, I feel that to refuse this request by the Solicitor General would not be compatible with our efforts and the Department's efforts to foster excellent working relationships.

RECOMMENDATION:

That I be authorized to advise the Solicitor General's Office of the availability of the Director's dining room for his use on either 9-24-75 or 9-25-75. If approved, we will work out the details.

1 - [redacted]
1 - [redacted]
1 - [redacted]
1 - [redacted]
EWW:slz
(6)

EW
9/8- [redacted] selected
Wed 9/14- [redacted] and we will
go see him Fri 9/12 to
work out details
see memo
EW:slz 9/13/75
161-9206-49
REC-46
EW
paid for
for

58 OCT 9 1975

OCT. 3 1975

OCT. 3 1975

ST. 114

15 SEP 16 1975

UNRECORDED COPY FILED IN

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. Jenkins

DATE: 9-15-75

FROM : E. W. Walsh

SUBJECT: REQUEST OF SOLICITOR GENERAL ROBERT H. BORK
TO USE DIRECTOR'S DINING ROOM FOR 12:30 P. M.
LUNCHEON 9-24-75

Assoc. Dir. ☒
Dep. AD-Adm. ☒
Dep. AD-Inv. ☒
Asst. Dir. ☒
Adm. Serv. ☒
Comp. Syst. ☒
Ext. Affairs ☒
Files & Com. ☒
Gen. Inv. ☒
Ident. ☒
Inspection ☒
Intell. ☒
Laboratory ☒
Legal Coun. ☒
Plan. & Eval. ☒
Spec. Inv. ☒
Training ☒
Telephone Rm. ☒
Director Sec'y ☒

My memorandum to you dated 9-4-75 approved by the Director authorized me to advise the Solicitor General's Office, in response to their request, of the availability of the Director's dining room for use by the Solicitor General and his staff 9-24-75.

This morning [] and I visited with the Solicitor General's Administrative Assistant, [], concerning the details for the luncheon at 12:30 p. m., 9-24-75. [] provided the attached list of names of the attendees. Four of the individuals, including the Solicitor General, have special access passes providing them unrestricted access to the JEH FBI Building. I advised [] that it might be well if all of the attendees would enter the 9th Street and Pennsylvania Avenue entrance to our building, and we would be prepared to escort them promptly to the Director's dining room. [] thought this would be a good idea.

[] asked if a menu could be prepared consisting of chicken kiev, salisbury steak with gravy or hamburger steak as the main course. Also mash potatoes, a green vegetable and garden salad should be prepared together with rolls, butter, coffee and ice cream or the like for dessert. There would be no cocktails, but it was desired that suitable red wine be served with the main course. The attorneys on the Solicitor General's staff are chipping in to defray the cost of this meal which [] indicated would probably work out to between \$4.00 and \$4.50. [] is to purchase the necessary food and other items, and [] will reimburse him.

We had a discussion as to whether a table cloth was necessary, and it was decided that our place mats normally used by the Director and his staff at lunch time would be fully satisfactory.

[] explained that one of the attendees; namely, [], would have to have a fresh water fish as his main course as his religious convictions prevent his eating meat of any kind, and we agreed that this would be provided.

Enc.

1 - []

1 - []

EWV:slz

1 - []

1 - []

1 - []

THREE
(OVER)



5010-108

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

(7) OCT 21 1975

Memo Walsh to Jenkins

Re: Request of Solicitor General Robert H. Bork
to use Director's Dining Room for 12:30 p. m.
Luncheon 9-24-75

[] commented that he would need assistance for that day and thought that one of the staff from the Attorney General's kitchen should be assigned to assist him. He knows all of the people in that activity, and [] agreed that this would be desirable, and she will advise us at a later time as to the identity of this person. Thereafter, [] will have him over to discuss with him what assistance [] will need on the day in question.

b6
b7C

[] stated she wanted Mr. Kelley to know that the Solicitor General was most appreciative and that he would not have made the request of the Director if the accommodations in the Attorney General's dining room were adequate to service 17 people, and it had been determined that they simply are inadequate for that number of luncheon guests.

RECOMMENDATION:

None. The foregoing is submitted for information and record purposes. We will work with the Solicitor General's Office on the details so that the proposed luncheon will be handled smoothly.

Qu

[Signature]

TJS
12

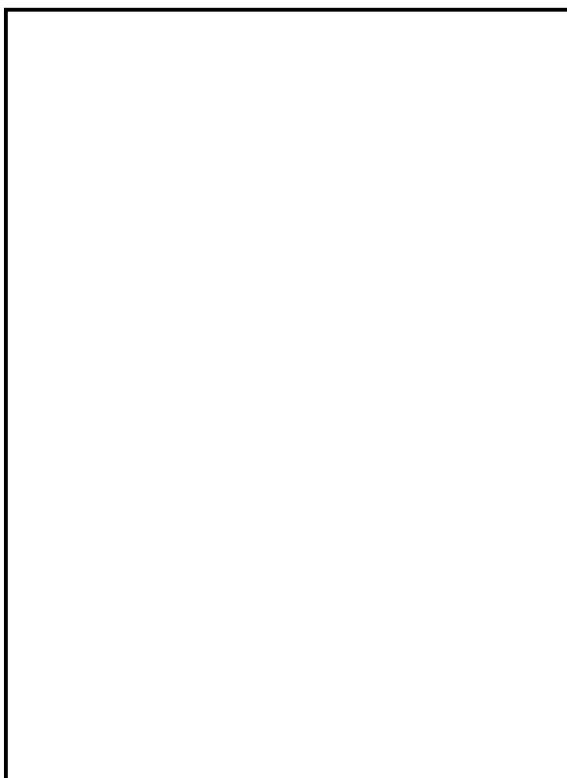
H

Luncheon on September 24 - F.B.I.

1. Robert H. Bork - Solicitor General
2. Daniel M. Friedman - Deputy Solicitor General
3. Andrew L. Frey - Deputy Solicitor General
4. A. Raymond Randolph - Deputy Solicitor General
5. Keith A. Jones - Deputy Solicitor General (does not have pass)

The following do not have FBI passes.

- 6.
- 7.
- 8.
- 9.
- 10.
- 11.
- 12.
- 13.
- 14.
- 15.
- 16.
- 17.



b6
b7C

ENCLOSURE

101-9206-50

September 17, 1975

Honorable Robert H. Bork
The Solicitor General
Department of Justice
Washington, D. C.

Dear Mr. Bork:

I would be honored to have you attend the dedication ceremony of the J. Edgar Hoover F.B.I. Building on Tuesday, September 30th, at 10:45 a.m. Enclosed is a ticket for your use.

It is suggested that you enter the Building at the center entrance on Pennsylvania Avenue where you will be met and escorted to your reserved seat. If you will be unable to attend, please have your secretary let us know by calling 324-5799.

I am looking forward to having you with us to celebrate this occasion.

Sincerely,

Clarence Kelley

Enclosure

1 -

Attention:

awt:bak (4)

58 OCT 23 1975

MAIL ROOM

TELETYPE UNIT

12 OCT 1 1975

b6
b7C

FEDERAL GOVERNMENT

DEC 5 1980

ROBERT H. BORK

Captioned individual, who you advised was born March 1, 1927, may be identical with Robert Heron Bork, born March 1, 1927, at Pittsburgh, Pennsylvania, who was the subject of an applicant-type investigation by the FBI in 1972 and 1973. Enclosed is one copy of FBI summary memorandum dated December 21, 1972, as well as an FBI letter dated January 24, 1973, both relating to this investigation.

161-9206

The central files of the FBI and the records of the Identification Division contain no additional pertinent information concerning the captioned individual based upon background information submitted in connection with this name check request.

Enclosures (2)

NOTE: Per request of Pres-elect Reagan's transition team. Coordinated with SA [redacted], Special Inquiry Matters Unit, Division 6, who will furnish this response to the transition team.

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.: _____
Adm. Servs. _____
Crim. Inv. _____
Ident. _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Insp. _____
Rec. Mgnt. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____
Telephone Rm. _____
Director's Sec'y _____

WRJ:wep
(5)

MAIL ROOM ☒

Attn: [redacted]
Room 3117

DE-101

b6
b7C

52

FEDERAL BUREAU OF INVESTIGATION
Records Branch

, 19__

- ☐ Name Searching Unit, 4543, TL# 115
☐ Service Unit, 4654, TL# 225
☐ Forward to File Review, 5447, TL# 143
☐ Attention _____
☐ Return to _____

Supervisor, Room, TL#, Ext.

Type of Search Requested: (Check One)

- ☐ Restricted Search (Active Index)
☒ Unrestricted (Active & Inactive Index)
☐ Unrestricted (5 & 30)

Special Instructions: (Check One)

- ☒ All References (Subversive & Nonsubversive)
☐ Subversive Search
☐ Nonsubversive Search
☐ Main _____ References Only
☐ Exact Name Only (On the Nose)
☐ Buildup ☐ Variations
☐ Restricted to Locality of _____

DEC 2 1980

Subject Bork, Robert H.
 Birthdate & Place 3/1/27 Pittsburgh,
 Address _____ from Pa.
_____ from _____
 Localities _____

R# 343 Date 12-2 Searcher Initials 60

Prod. _____

FILE NUMBER SERIAL

NP 56677NP 182-2461NP 161-9206NP 62-115698-255NP 66-11201-1363 p#3NP 66-19162-61 encl p#1NP 62-81535-224Robert Heron (34)161-9206-40 Sum 122673RobertNP 9-61756NP 197-402

DEC 3 1980

FILES AND RECORDS DESTRUCTION ORDER

Date 11/20/70

TO: SAK
FROM: [redacted]
RE: File No. 62-7608

b6
b7C

I have reviewed this file, and under the criteria set forth in Part II, Section 3, of Manual of Rules and Regulations, this file should be:

☒ Destroyed

under the ☐ 120-day Rule ☐ 1-year Rule ☒ 5-year Rule ☐ 10-year Rule

☐ Retained

Justification for Retention is as Follows:

Case Agent's Initials [signature]Supervisor's Initials [signature]

To be maintained as Top Serial.

United States District Court

FOR THE

DISTRICT OF NEBRASKA

CIVIL ACTION FILE NO. 75-0-211

JOHN JOSEPH SALANITRO, SR., GUARDIAN

Plaintiff

v.

SUMMONS

ROBERT H. BORK , as Acting Attorney
General of the United States, et al.,

Defendant

To the above named Defendant :

You are hereby summoned and required to serve upon David L. Herzog,

plaintiff's attorney , whose address 1431 First National Center, Omaha,
Nebraska

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

RICHARD C. PECK

Clerk of Court.

Deputy Clerk.

Date: JUNE 4, 1975

[Seal of Court]

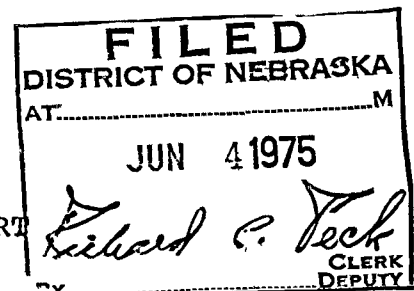
NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

62-7608-1

SEARCHED.....	INDEXED.....
SERIALIZED.....	FILED.....
JUN 19 1975	
FBI — LOS ANGELES	

12

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN JOSEPH SALANITRO, SR.,
Guardian of the Estate of
JOHN JOSEPH SALANITRO, JR.
and JOSEPH JOHN SALANITRO,

Plaintiffs,

vs.

ROBERT H. BORK, as Acting
Attorney General of the United
States; HENRY E. PETERSON, as
Assistant Attorney General of
the United States; RICHARD
KLEINDEINST, as Director of
Federal Bureau of Investiga-
tion; WILLIAM E. ZLEIT,
Special Attorney, United States
Department of Justice; EDWARD
D. O'BRIEN, Special Agent,
Federal Bureau of Investiga-
tion; ROBERT KRAFT; MARTHA ANN
PITTARD; JAMES BURNS: JOHN DOE
I; JOHN DOE II; JOHN DOE III;
JOHN DOE IV; and JOHN DOE V,
real and true names unknown,
Agents of the Federal Bureau
of Investigation,

Defendants.

CIVIL NO. 75-0- 211

COMPLAINT FOR DECLARATORY
RELIEF, INJUNCTION AND DA-
MAGES TO RESTRAIN THE OPERA-
TION AND ENFORCEMENT OF A
FEDERAL STATUTE, FOR A
DECLARATION OF UNCONSTITU-
TIONALTY, FOR DAMAGES AND
OTHER RELIEF (THREE-JUDGE
COURT REQUESTED -- JURY
DEMANDED)

JUDGE SCHATZ

JURISDICTION

1. This Court has jurisdiction under 28 U.S.C. Section 1331 as this action arises under the Constitution and laws of the United States, more particularly the First, Fourth, Fifth, Sixth and Ninth Amendments to the Constitution and 18 U.S.C. Section 2516-2519; 28 U.S.C. Section 1361, as this action seeks to compel the Defendants, who are Officers of the United States, to perform duties owed to the Plaintiff. The amount in controversy exceeds the sum of \$10,000.00; exclusive of interest and costs. On April 12, 1972, at a regular session of the County Court of Douglas County, Nebraska, duly held at the City of Omaha, in and for said County, John Joseph Salanitro, Sr., identified herein as Plaintiff, was by Order of the Douglas County Court in proceedings in Book 31 at Page 84 and in Book 31 at Page 86, duly entered upon the records and was appointed on that date Guardian of John Joseph Salanitro, Jr. and Guardian of Joseph John Salanitro.

Said children are the sons of the Plaintiff John Joseph Salanitro, Sr. and reside in Omaha, Douglas County, Nebraska, with Plaintiff John Joseph Salanitro, Sr. at 902 South 88th Street, Omaha, Nebraska.

On November 14, 1973, John Joseph Salanitro, Sr., as Guardian for said children, having obtained a license to sell real estate from the County Court of Douglas County, Nebraska, did sell at the East front door of the Douglas County Courthouse in Omaha, Nebraska, to the highest bidder, for cash, the undivided one-third (1/3) interest possessed by each of the above named children in Lot 8, Block 3 in Tower Plaza, an addition to the City of Omaha, lying Southerly from a line 100 feet Northerly from and parallel to the Southerly line of said Lot 8, being the Southerly 100 feet of said Lot, Douglas County, Nebraska, as surveyed, platted and recorded.

The sale on November 14, 1973, as aforesaid, was conducted pursuant to said Order of Sale issued by the County Court of Douglas County, Nebraska, which Order in said proceedings was dated October 22, 1973.

Prior to the sale of said real estate on November 14, 1973, Plaintiff received from the Estate of Louise Salanitro, Deceased, in proceedings in Book 103 at Page 335 in the County Court of Douglas County, Nebraska, in behalf of said children the sum of \$2,883.64.

On November 26, 1973, the Defendants named above who were employed and were acting within the scope of their employment as special agents of the Federal Bureau of Investigation, seized money in cash pursuant to an illegally obtained Search Warrant issued by United States Magistrate in proceedings filed in Magistrate Docket No. 2 as Case No. 74 from premises at 902 South 88th Street, Omaha, Nebraska. The money so seized by the Defendants or some of them amounted to a sum in excess of \$40,000.00 and included the funds held by Plaintiff as Guardian for said minor children in the amount of \$2,883.64 together with the additional sum of \$7,969.72 which constituted the

proceeds paid to Plaintiff in behalf of his wards upon the sale of the real estate described above which occurred at the Douglas County Courthouse, Omaha, Nebraska, on November 14, 1973.

At the time that the said agents, servants and employees of the Federal Bureau of Investigation seized said money on November 26, 1973, Plaintiff held \$10,753.56 as Guardian for said children. The sum of \$10,753.56 is now being wrongfully and unlawfully held by the Agents of the Federal Bureau of Investigation and should be paid over to the Plaintiff as Guardian of said children and be restored to his possession as Guardian. Plaintiff, as Guardian, has no right, title or interest in and to said sum of \$10,753.56 that is referable to or may be claimed by Plaintiff in his own right and merely hold said monies in trust for the use and benefit of said children. Plaintiff is entitled to the lawful possession of the money which was illegally seized, as aforesaid. There is therefore a constructive trust which this Plaintiff, as Guardian, seeks to recover.

NATURE OF CAUSE

2. This civil action is brought to restrain the operation and enforcement of 18 U.S.C. Sections 2516-2519, the wiretapping and electronic surveillance provisions of the 1968 Omnibus Crime Act, to declare said sections unconstitutional, and to restrain the Defendants and others acting in concert with them from employing the fruits of illegal activity conducted under the color of these provisions of the Act to harass and intimidate the Plaintiff. The Plaintiff also seeks to enjoin invasion of his privacy by unlawful electronic surveillance not undertaken under color of said Act.

PARTIES

3. The Plaintiff is a citizen of the United States, and a resident of the State of Nebraska.

4. The Defendants are officers and agents of the United States. The designated Acting Attorney General of the United States is the chief law enforcement officer of the Federal Government. Defendant Kleindeinst is Director of the Federal Bureau of Investigation. Defendants Edward D. O'Brien, Robert Kraft, Martha Ann Pittard, James Burns, John Doe I, John Doe II, John Doe III, John Doe IV and John Doe V, or some of them, or their predecessors in office, are and have been engaged in electronic surveillance of the Plaintiff, both under color of the Crime Control Act of 1968, 18 U.S.C. Section 2516-2519 and without the pretense of such authority although under color of law. The Defendants, or some of them, and their successors or predecessors in office have been engaged, jointly and severely, in using the fruits of illegal wiretapping and other illegal electronic surveillance to harass and intimidate the Plaintiff as more fully set forth below. These Defendants have been assisted in their activities by their agents, servants, and employees and by other persons acting in concert with them. The action of such persons is under color of law.

FIRST CLAIM (THREE-JUDGE COURT)

5. Acting under the purported authority of the Crime Control Act wiretapping provisions, 18 U.S.C. Section 2516-2519, the Defendants, or some of them, or other persons acting in concert with them, obtained an Order authorizing interception of telephone conversations over telephone number 402-551-0854 and 402-551-1333 located at 4410 Davenport Street, Omaha, Nebraska. This Order was obtained from Robert Van Pelt, United States District Judge for the District of Nebraska on November 9, 1973.

6. On information and belief, during the period after November 9, 1973, the Defendants, or some of them, or their agents, servants and employees or others acting in concert with them, overheard or assisted in the overhearing of telephone conversations and participated in dissemination of those conversations and/or the leads or evidence derived therefrom.

SECOND CLAIM

10. The Plaintiff incorporates and realleges Paragraphs 5 through 9.

11. Using information obtained through illegal and unconstitutional wiretaps, Defendants, or some of them, and their agents and servants, obtained search warrants for search of the premises belonging to the Plaintiff as his residence or in which the Plaintiff has an interest at all relevant and material times. Further, using the information obtained through illegal and unconstitutional wiretaps, the Defendants, or some of them, obtained an arrest warrant for the Plaintiff, individually.

12. These warrants were based solely or almost solely upon information obtained through the wiretaps described above.

13. Upon information and belief, the Defendants, or some of them, have used the information obtained from unconstitutional wiretaps to foment investigations of Plaintiff by State and Federal Agencies. These investigations are designed to and do have the effect of preventing the Plaintiff from carrying on normal and lawful business activities, from traveling in interstate commerce, from enjoying a sense of privacy and solitude, and from exchanging ideas and associating with others.

14. The information obtained by the use of unconstitutional wiretaps is still in the possession of the Defendants.

The Defendants have used such information in the past to harass, intimidate and annoy the Plaintiff and will do so in the future unless restrained by this Court. The Plaintiff has no speedy, plain and adequate remedy at law to prevent such use by the Defendants, their agents and servants.

THIRD CLAIM

15. Plaintiff incorporates and realleges Paragraphs 5 through 14.

16. The application for wiretap orders referred to in Paragraph 5 above, were not based upon reasonable and probable cause to believe that this Plaintiff was engaged in the com-

mission of criminal offenses set forth in 18 U.S.C., Section 2516-2519. The applications for said orders were defective, used illegally seized evidence as part of the showing of probable cause and the orders issued pursuant to said applications were similarly deficient, defective and void.

17. Defendants and their agents and servants are using and have threatened to use the evidence and information obtained from the wiretaps alleged above. The Plaintiff has no speedy, plain and adequate remedy at law, since the remedies available at law are limited to suppression of evidence and do not extend to the prohibition of the use of the illegally obtained material other than in a trial or hearing.

18. The Plaintiff has been subjected to and is subject to immediate and irreparable harm through the use and threatened use of communications intercepted in violation of the provisions of 18 U.S.C., Section 2516-2519 because his privacy has been, is and will be continually invaded through such use in ways which damages cannot compensate.

FOURTH CLAIM

19. Plaintiff incorporates and realleges Paragraph 5 through 18.

20. On information and belief, since 1960, the exact date being unknown to the Plaintiff, the Defendants, their agents, their servants and employees and their predecessors in office or their successors in office have at various times conducted unlawful electronic surveillance directed against the Plaintiff and his constitutionally protected residence and have disseminated the fruits of such surveillance to various officers and agents of the United States, the several states and other Government employees, as well as to private persons.

21. In information and belief, interceptions and invasions have taken place at times and places and directed against this Plaintiff, his home and residence.

22. These invasions and interceptions were undertaken in violation of the Fourth Amendment, and without authorization under any law of the United States, and without any lawful authority whatever. In addition, the use of the 1970 wiretap within the application for the 1973 wiretap constitutes a patently illegal and felonious act as provided by 18 U.S.C. Section 2511. In addition, this Plaintiff qualifies as an aggrieved person under the provisions of 18 U.S.C. Section 2518 (10) a).

23. The Plaintiff has no plain, speedy and adequate remedy at law to redress the immediate and irreparable harm represented by the continued invasion of his premises, interception of his conversations, the dissemination, disclosure and storage and use of the materials obtained thereby.

24. Pursuant to the Order of Judge Robert Van Pelt improperly and, illegally obtained by the Defendants, or some of them, agents of the Federal Bureau of Investigation, on or about November 26, 1973, did, pursuant to an illegally obtained search warrant, seized cash in the amount of \$41,090.55 from the residence of the Plaintiff at 902 South 88th Street, Omaha, Nebraska, and this cash in the amount of \$41,090.55 is now in the possession of and comingled with other funds the exact whereabouts of which are unknown to Plaintiff.

WHEREFORE, Plaintiff prays as follows, to wit:

1. That a Three-Judge Federal Court be convened to hear the portions of this action designated as "First Claim" and "Second Claim".

2. That a preliminary injunction issue to the Defendants, their agents, servants and employees and all those acting in concert with them and all those having notice of the terms of such injunction:

(a) Restraining them from enforcing, employing the provisions of, or relying upon 18 U.S.C. Section 2516-2519 against this Plaintiff;

(b) Directing them to return to this Plaintiff all recordings, transcripts, logs, memoranda and writings of whatever character containing or reflecting

information gained from unlawful interceptions of oral communications; and

(c) Restraining them from using the contents of said oral communications and any leads or evidence derived therefrom in any manner whatever, including but not limited to the dissemination and disclosure of such communications, leads and evidence.

3. That a permanent injunction issue on the same effect as the preliminary injunction.

4. That 18 U.S.C. Section 2516-2519, be declared unconstitutional on its face and as applied to this Plaintiff.

5. That the Plaintiff be awarded damages in the sum of \$41,090.55, interest, costs of suit and a reasonable attorney fee.

6. That the Plaintiff be awarded compensatory damages in the amount of \$100,000.00.

7. And for such other and further relief as justice and equity require.

DATED this 4th day of June, 1975.

JOHN JOSEPH SALANITRO, SR.,
Guardian of the Estate of
JOHN JOSEPH SALANITRO, JR.
AND JOSEPH JOHN SALANITRO,
Plaintiffs,

By David Herzog
DAVID HERZOG
Attorney for Plaintiffs
1431 First National Center
Omaha, Nebraska 68102

STATE OF NEBRASKA)
)S.S.
COUNTY OF DOUGLAS)

JOHN JOSEPH SALANITRO, SR., Guardian, being first duly sworn upon oath, deposes and says that he is the Plaintiff in the above entitled action; that he has read the contents of the foregoing Pleading, and says that the allegations therein contained are true as he verily believes.

John Joseph Salanitro, Sr.
JOHN JOSEPH SALANITRO, SR.,
Guardian

SUBSCRIBED AND SWORN to before me, a Notary Public, this
4th day of June, 1975.

L/S SHARI DIMMITT
Notary Public

United States District Court

FOR THE

DISTRICT OF NEBRASKA

CIVIL ACTION FILE NO. 75-0.210

PAMELA SALANITRO,

Plaintiff

v.

SUMMONS

ROBERT H. BORK, as Acting Attorney
General of the United States, et al.,

Defendant

To the above named Defendant :

You are hereby summoned and required to serve upon DAVID L. HERZOG ,

plaintiff's attorney , whose address is 1431 First National Center, Omaha,
Nebraska,

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

RICHARD C. PECK

Clerk of Court.

Deputy Clerk.

Date: JUNE 4, 1975

[Seal of Court]

SEARCHED

SERIALIZED

FILED

FBI - LOS ANGELES

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PAMELA SALANITRO,

Plaintiff,

vs.

ROBERT H. BORK, as Acting
Attorney General of the
United States; HENRY E.
PETERSON, as Assistant
Attorney General of the
United States; RICHARD
KLEINDEINST, as Director of
the Federal Bureau of Investi-
gation; WILLIAM E. ZLEIT,
Special Attorney, United
States Department of Justice;
EDWARD D. O'BRIEN, Special
Agent, Federal Bureau of
Investigation; ROBERT KRAFT;
MARTHA ANN PITTARD; JAMES
BURNS; JOHN DOE I; JOHN DOE
II; JOHN DOE III; JOHN DOE IV;
and JOHN DOE V, real and true
names unknown, Agents of the
Federal Bureau of Investigation,

Defendants.

CIVIL NO. 75-0-210

FILED	
DISTRICT OF NEBRASKA	
AT _____	M _____
JUN 4 1975	
COMPLAINT FOR DECLARATORY RELIEF, INJUNCTION AND DAM- AGES TO RESTRAIN THE OPER- ATION AND ENFORCEMENT OF ANY FEDERAL STATUTE, FOR A DE- CLARATION OF UNCONSTITUTION- ALTY, FOR DAMAGES AND OTHER RELIEF (THREE-JUDGE COURT REQUESTED -- JURY DEMANDED)	

E. SCHATZ
JUDGE SCHATZ

JURISDICTION

1. This Court has jurisdiction under 28 U.S.C. Section 1331 as this action arises under the Constitution and laws of the United States, more particularly the First, Fourth, Fifth, Sixth and Ninth Amendments to the Constitution and 18 U.S.C. Section 2516-2519; 28 U.S.C. Section 1361, as this action seeks to compel the Defendants, who are officers of the United States, to perform duties owed to the Plaintiff. The amount in controversy exceeds the sum of \$10,000.00, exclusive of interest and costs.

NATURE OF CAUSE

2. This civil action is brought to restrain the operation and enforcement of 18 U.S.C. Sections 2516-2519, the wiretapping and electronic surveillance provisions of the 1968 Omnibus Crime Act, to declare said sections unconstitutional, and to restrain the Defendants and others acting in concert with them from employing the fruits of illegal activity conducted under the color of these provisions of the Act to harass and intimidate the Plaintiff. The Plaintiff also seeks to enjoin invasion of her privacy by unlawful

electronic surveillance not undertaken under color of said Act.

PARTIES

3. The Plaintiff is a citizen of the United States, and a resident of the State of Nebraska.

4. The Defendants are officers and agents of the United States. The designated Acting Attorney General of the United States is the chief law enforcement officer of the Federal Government. Defendant Kleindeins is Director of the Federal Bureau of Investigation. Defendants Edward D. O'Brien, Robert Kraft, Martha Ann Piitard, James Burns, John Doe I, John Doe II, John Doe III, John Doe IV, and John Doe V, or some of them, or their predecessors in office, are and have been engaged in electronic surveillance of the Plaintiff, both under color of the Crime Control Act of 1968, 18 U.S.C. Section 2516-2519 and without the pretense of such authority although under color of law. The Defendants, or some of them, and their successors or predecessors in office have been engaged, jointly and severely, in using the fruits of illegal wiretapping and other illegal electronic surveillance to harass and intimidate the Plaintiff as more fully set forth below. These Defendants have been assisted in their activities by their agents, servants and employees and by other persons acting in concert with them. The action of such persons is under color of law.

FIRST CLAIM (THREE-JUDGE COURT)

5. Acting under the purported authority of the Crime Control Act wiretapping provisions, 18 U.S.C. Section 2516-2519, the Defendants, or some of them, or other persons acting in concert with them, obtained an Order authorizing interception of telephone conversations over telephone number 402-551-0854 and 402-551-1333 located at 4410 Davenport Street, Omaha, Nebraska. This Order was obtained from Robert Van Pelt, United States District Judge for the District of Nebraska on November 9, 1973.

6. On information and belief, during the period after November 9, 1973, the Defendants, or some of them, or their agents, servants and employees or others acting in concert with them, overheard or assisted in the overhearing of telephone conversations and participated in dissemination of those conversations and/or the leads or evidence derived therefrom to others unknown to Plaintiff.

7. On information and belief, the wiretap was obtained by and through the use of an Order obtained from Judge Richard E. Robinson, United States District Judge for the District of Nebraska, authorizing interception of telephone conversations over telephone number 402-345-0550 which Order was obtained on or about December 2, 1970 to run to and including December 12, 1970. The evidence obtained pursuant to said Order of Judge Robinson obtained on or about December 2, 1970, was suppressed and declared illegal within proceedings and rulings before this Court in Criminal 01647 and Criminal No. 71-0-127. Moreover, the evidence seized pursuant to said Wiretap Order issued by Judge Robinson on December 2, 1970, subsequently suppressed were used by the Defendants in obtaining the Order issued by United States District Judge Robert Van Pelt entered on November 9, 1973.

8. The interception of wire communications obtained by the Defendants on November 9, 1973, was undertaken in reliance upon the provisions of 18 U.S.C. Section 2516-2519.

These sections are vague and over-broad and intimidate the free exchange of ideas, permit general searches, compel self-incrimination, permit, and have been construed by the Defendants to permit intrusions into attorney-client communications, and authorize an impermissible invasion of the constitutionally protected right of privacy. Thus, the Crime Control Act wiretapping provisions are void as violative of the First, Fourth, Fifth, Sixth and Ninth Amendments.

9. The Plaintiff has no plain, speedy and adequate remedy at law. Privacy, once compromised, cannot be restored.

The Defendants or some of them, threatened to use and have threatened to use the Crime Control Act wiretapping provisions against the Plaintiff in the future, and will do so unless restrained by this Court.

SECOND CLAIM

10. The Plaintiff incorporates and realleges Paragraphs 5 through 9.

11. Using information obtained through illegal and unconstitutional wiretaps, Defendants, or some of them, and their agents and servants, obtained search warrants for search of the premises belonging to the Plaintiff as her residence or in which the Plaintiff has an interest at all relevant and material times. Further, using the information obtained through illegal and unconstitutional wiretaps, the Defendants, or some of them, obtained an arrest warrant for the spouse of the Plaintiff.

12. These warrants were based solely or almost solely upon information obtained through the wiretaps described above.

13. Upon information and belief, Defendants, or some of them, have used the information obtained from unconstitutional wiretaps to foment investigations of Plaintiff by State and Federal agencies. These investigations are designed to and do have the effect of preventing the Plaintiff from carrying on normal and lawful business activities, from traveling in interstate commerce, from enjoying a sense of privacy and solitude, and from exchanging ideas and associating with others.

14. The information obtained by the use of unconstitutional wiretaps is still in the possession of the Defendants. The Defendants have used such information in the past to harass, intimidate and annoy the Plaintiff and will do so in the future unless restrained by this Court. The Plaintiff has no speedy, plain and adequate remedy at law to prevent such use by the Defendants, their agents and servants.

THIRD CLAIM

15. Plaintiff incorporates and realleges Paragraphs 5 through 14.

16. The applications for wiretap orders referred to in Paragraph 5 above were not based upon reasonable and probable cause to believe that this Plaintiff was engaged in the commission of criminal offenses set forth in 18 U.S.C. Section 2516-2519. The applications for said orders were defective, used illegally seized evidence as part of the showing of probable cause and the orders issued pursuant to said applications were similarly deficient, defective and void.

17. Defendants and their agents and servants are using and have threatened to use the evidence and information obtained from the wiretaps alleged above. The Plaintiff has no speedy, plain and adequate remedy at law, since the remedies available at law are limited to suppression of evidence and do not extend to the prohibition of the use of the illegally obtained material other than in a trial or hearing.

18. The Plaintiff has been subjected to and is subject to immediate and irreparable harm through the use and threatened use of communications intercepted in violation of the provisions of 18 U.S.C. 2516-2519 because her privacy has been, is and will be continually invaded through such use in ways which damages cannot compensate.

FOURTH CLAIM

19. Plaintiff incorporates and realleges Paragraphs 5 through 18.

20. On information and belief, since 1960, the exact date being unknown to the Plaintiff, the Defendants, their agents, their servants and employees and their predecessors in office, or their successors in office have at various times conducted unlawful electronic surveillance directed against the Plaintiff and her constitutionally protected residence and have disseminated the fruits of such surveillance to various officers and agents of the United

States, the several states and other Government employees, as well as to private persons.

21. On information and belief, interceptions and invasions have taken place at times and places and directed against this Plaintiff, her home and residence.

22. These invasions and interceptions were undertaken in violation of the Fourth Amendment, and without authorization under any law of the United States, and without any lawful authority whatever. In addition the use of the 1970 wiretap within the application for the 1973 wiretap constitutes a patently illegal and felonious act as provided by 18 U.S.C. Section 2511. In addition, this Plaintiff qualifies as an aggrieved person under the provisions of 18 U.S.C. Section 2518 (10 a):

23. The Plaintiff has no plain, speedy and adequate remedy at law to redress the immediate and irreparable harm represented by the continued invasion of her premises, interception of her conversations, the dissemination, disclosure and storage and use of the materials obtained thereby.

24. Pursuant to the Order of Judge Robert Van Pelt improperly and illegally obtained by the Defendants, or some of them, agents of the Federal Bureau of Investigation, on or about November 26, 1973, did, pursuant to an illegally obtained search warrant, seized cash in the amount of \$41,090.55 from the residence of the Plaintiff at 902 South 88th Street, Omaha, Nebraska, and this cash in the amount of \$41,090.55 is now in the possession of and commingled with other funds the exact whereabouts of which are unknown to Plaintiff.

WHEREFORE, Plaintiff prays as follows, to wit:

1. That a Three-Judge Federal Court be convened to hear the portions of this action designated as "First Claim" and "Second Claim".

2. That a preliminary injunction issue to the Defendants, their agents, servants and employees and all those acting in concert with them and all those having notice of the terms of such injunction:

(a) Restraining them from enforcing, employing the provisions of, or relying upon 18 U.S.C. Section 2516-2519 against this Plaintiff;

(b) Directing them to return to this Plaintiff all recordings, transcripts, logs, memoranda and writings of whatever character containing or reflecting information gained from unlawful interceptions of oral communications; and

(c) Restraining them from using the contents of said oral communications and any leads or evidence derived therefrom in any manner whatever, including but not limited to the dissemination and disclosure of such communications, leads and evidence.

3. That a permanent injunction issue to the same effect as the preliminary injunction.

4. That 18 U.S.C. Section 2516-2519 be declared unconstitutional on its face and as applied to this Plaintiff.

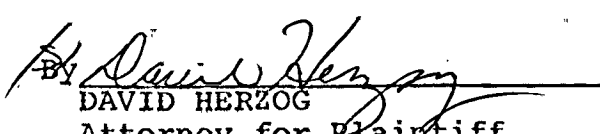
5. That the Plaintiff be awarded damages in the sum of \$41,090.55, interest, costs of suit and a reasonable attorney fee.

6. That the Plaintiff be awarded compensatory damages in the amount of \$100,000.00.

7. And for such other and further relief as justice and equity require.

DATED this 29th day of May, 1975.

PAMELA SALANITRO, Plaintiff


DAVID HERZOG
Attorney for Plaintiff
1431 First National Center
Omaha, Nebraska 68102

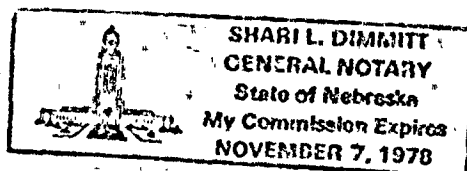
STATE OF NEBRASKA)
) S.S.
COUNTY OF DOUGLAS)

PAMELA SALANITRO, being first duly sworn upon oath, deposes and states that she is the Plaintiff in the above entitled action, that she has read the contents of the foregoing Pleading and says that the allegations therein contained are true as she verily believes.

Pamela Salanitro
PAMELA SALANITRO

SUBSCRIBED AND SWORN to before me, this 29th day
of May, 1975.

Shari L. Dimmitt
Notary Public



11000 Wilshire Boulevard
Los Angeles, California 90024
June 16, 1975

Mr. Edward Levi
Attorney General
Washington, D.C.

Re: John Joseph Salanitra Sr.
Guardian, vs. Robert H. Bork
as Acting Attorney General
of the United States, et al,
75-0-211;

Pamela Salanitra vs. Robert H.
Bork, as Acting Attorney
General of the United States,
et al, 75-0-210

Dear Mr. Attorney General:

I have been named as a defendant in the civil action
set out above which has been filed in United States District
Court for the District of Nebraska, filed on June 4, 1975.

All of my actions in connection with the subject
matter of the suit set forth above were within the scope of my
employment with the Federal Bureau of Investigation, and were
done by me with good faith and belief in the lawfulness and
responsiveness of my action.

I have not retained private counsel to represent me
in this matter and it is my desire that the Department furnish
representation for me in this same matter.

Sincerely yours,

[Redacted Signature]

Special Agent, FBI
Los Angeles, California

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62-7608-3

SEARCHED.....	INDEXED.....
SERIALIZED.....	FILED.....
JUN 19 1975	
FBI - LOS ANGELES	

FBI

Date: 6/16/75

Transmit the following in PLAIN
(Type in plaintext or code)Via AIRTEL AIR MAIL
(Priority)

TO: DIRECTOR, FBI

ATTN: OFFICE OF LEGAL COUNSEL

FROM: SAC, LOS ANGELES (82-NEW)

RE: JOHN JOSEPH SALANITRO, SR., VS
ROBERT H. BORK ET AL
(U.S.D.C., DISTRICT OF NEBRASKA)
CIVIL ACTION #75-0-211PAMELA SALANITRO VS
ROBERT H. BORK, ET AL
(U.S.D.C., DISTRICT OF NEBRASKA)
CIVIL ACTION # 75-0-210

Enclosed for the Bureau are three (3) copies each of summons and complaints in the captioned cases. Also enclosed is a personal letter from SA [redacted] of the Los Angeles Division to EDWARD LEVI, Attorney General, dated 6/16/75.

Service of the enclosed summons and complaint was accepted at Los Angeles and made by the U. S. Marshal on 6/12/75.

SA [redacted] is submitting a personal letter to the Attorney General requesting representation in this suit. It is requested that the enclosed letter from SA [redacted] be delivered to the office of the Attorney General.

No letterhead memorandum enclosing the complaint is being submitted by Los Angeles as Omaha is the situs of action.

Information copy for Omaha in view of the fact that complaint filed there.

2-Bureau (Encl's-8)
1-Omaha (Info)
1-Los Angeles
JAW:ism
(5)

62-7608-4
SEARCHED
INDEXED
SERIALIZED

Approved: **OFFICE COPY**
Special Agent in Charge

Sent

Assistant Attorney General
Criminal Division

July 29, 1975

Director, FBI

PAMELA SALANITRO v. ROBERT H. BORK, et al.
(U.S.D.C., D. NEB.)
CIVIL ACTION NO. 75-0-210

JOHN JOSEPH SALANITRO, SR., v. ROBERT H. BORK, et al.
(U.S.D.C., D. NEB.)
CIVIL ACTION NO. 75-0-211

In response to your memorandum, with enclosures, dated June 24, 1975, captioned as above, your reference JCK:RLK:JBSmith:mlh, the following information is submitted.

This Bureau instituted an investigation of [redacted], which is ongoing, to determine if [redacted] in violation of Federal law. As a result of this investigation, an affidavit (attachment 1) seeking authority to apply for a court order for the interception of wire communications emanating from telephones being used by [redacted] was submitted to the Acting Attorney General on November 2, 1973. The Assistant Attorney General, Criminal Division, approved this request on November 9, 1973, authorizing the Bureau to intercept wire communications for a twenty (20) day period to and from telephones bearing numbers [redacted].

On November 9, 1973, the documentation requesting electronic coverage of the activities of [redacted], and others was submitted to United States District Judge Robert Van Pelt, District of Nebraska, Omaha, by Departmental Attorney [redacted], Kansas City

- 1 - Omaha (62-3445)
- ① - Los Angeles (62 New)
- 1 - New York (62 New)
- 1 - Chicago (62-7218)
- (Bufile 182-2461)

62-7608-5

SEARCHED	INDEXED
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13 JUL 31 1975	
FBI - LOS ANGELES	

Assistant Attorney General
Criminal Division

Strike Force and Special Agent [redacted].
Judge Van Pelt approved this request and issued an order
authorizing the same. Surveillance was instituted on
telephone number [redacted], and
on telephone number [redacted].
These installations were discontinued on [redacted].

Based on the results of information received
from these installations which, for example, indicated
that [redacted]

[redacted], search
warrants were issued and executed on November 26, 1973,
which authorized a body search of the person of [redacted]
[redacted], and another individual and the
search of various residences. Included in the residential
searches were (1) [redacted] home located at [redacted]
[redacted] (2) a residence located at [redacted]
where [redacted]

[redacted];
and (3) a residence located at [redacted], Omaha, where
it was determined through electronic surveillance and other
investigation [redacted]

[redacted]. Enclosed as attachment 2 is a copy of
an affidavit for search warrants for [redacted] person and
the above-described residences. Enclosed as attachment 3 is
one copy each of FD-302s which records the results of the
above-referenced searches.

On March 28, 1975, [redacted],
was indicted by a Federal Grand Jury at Omaha, Nebraska,
for violations of Title 18, United States Code, Sections 1955,
2, 1511, and 1952. Prosecution on the above charges
is pending.

Employees of this Bureau identified as defendants
are: (1) Special Agent [redacted], presently assigned
to FBI Headquarters who has not been served with process;
(2) Special Agent [redacted], presently assigned to our
New York Office who was served on June 11, 1975;
(3) Special Agent [redacted], now assigned to the
Chicago Office who was served on June 10, 1975, and
(4) Special Agent [redacted], presently assigned to the
Los Angeles Office who was served on June 12, 1975.

Assistant Attorney General
Criminal Division

We believe that at all times relevant to this Bureau's investigation of [redacted], the defendant employees of this Bureau were acting within the scope of their duties as Special Agents of the FBI and in a good faith belief as to the reasonableness of any actions they took during this investigation. We urge they be represented by the Department and enclose separately the requests of Special Agents [redacted] and [redacted] for this purpose. The request of Special Agent [redacted] will be furnished you upon its receipt.

For your information, the allegations made by the complaints herein were previously raised in a civil action case entitled "Max Abramson, et al., v. John N. Mitchell, et al., Civil Action No. 71-0-165," your reference LPGIII:DJAnderson:paf, 117-45-1, filed in United States District Court, Omaha, Nebraska, March 18, 1971, which also involved a Title III interception. Enclosed as attachment 4 is a copy of the complaint filed in this action and the Government's answer thereto. The District Court dismissed the Abramson civil suit on July 20, 1971. The Court's Order of Dismissal and Memorandum Opinion thereon are enclosed as attachment 5. An appeal was taken from the Abramson dismissal order which did not raise the issues of the constitutionality of the Omnibus Crime Control Act, Title 18, United States Code, Sections 2516 - 2519, or the request for a 3-judge court but was related to the issue of compliance with the act. The Appellate Court reversed and remanded for an evidentiary hearing on the latter issue. (See attachment 6.)

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The relief requested by both complaints is substantially that sought in the Abramson case, supra. However, the complaint of [redacted], does in addition allege that certain monies seized pursuant to an authorized search of his residence on November 26, 1973, included funds held by him as guardian for his minor children which he seeks to recover. He filed a civil

Assistant Attorney General
Criminal Division

action for this purpose in the United States District Court against the United States which was dismissed May 15, 1974. For your assistance, a copy of his interview concerning this claim is enclosed as attachment 7. Enclosed as attachments 8 and 9 are the Government's Pretrial Brief and the Court's Memorandum Opinion in this litigation.

Plaintiffs' complaints allege that they were individually subject to electronic surveillance since 1960. Enclosed as attachment 10 is a copy of my memorandum to you dated June 24, 1975, captioned "[redacted] and Others; Electronic Surveillance" which sets forth this Bureau's electronic coverage of [redacted], during the present criminal investigation and earlier electronic coverage of him. We, in addition, have reviewed the Electronic Surveillance (ELSUR) indices at both FBI Headquarters and our Omaha Office to determine if [redacted], under that name or [redacted], has been subject to such coverage with negative results. [redacted]

[redacted]

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Plaintiffs allege further in their complaints that the results of this Bureau's investigation of the [redacted] activities of [redacted], have been disseminated to other Federal and state agencies. Our records indicate that investigative reports in connection with the [redacted] operations of [redacted], have been furnished to only the United States Attorney, Omaha, Nebraska; the Strike Force, Kansas City, Missouri; and the Organized Crime and Racketeering Section, Criminal Division, Department of Justice.

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Plaintiffs' complaints additionally allege that the application for authorization for a Title III intercept in the present criminal investigation of [redacted] [redacted], was based on information obtained during

Assistant Attorney General
Criminal Division

the course of the authorized Title III intercept in the Abramson case referred to above. We believe a review of the material contained in attachment 1 will demonstrate such allegations are without foundation.

It would appear that the defense of res adjudicata could be made to the claim of [redacted], for the recovery of a portion of the money seized from his residence on November 26, 1973.

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Plaintiffs allege that Sections 2516 - 2519 of Title 18, United States Code, are unconstitutional as violative of certain of their constitutional rights and request the 3-judge court to litigate this issue. We recognize that the District Court is not bound by the prior ruling of the court in the Abramson case, supra., with regard to these issues, but it would appear that such decision would be persuasive in ruling on the identical claims raised here.

Since [redacted] had no proprietary interest in the premises subject to the Title III intercepts which were directed at [redacted], we do not believe she has standing to maintain her cause of action. We suggest as further defenses that: (1) both complaints fail to state a claim upon which relief can be granted; (2) this action seeks equitable relief enjoining a criminal action which is granted only in extraordinary circumstances which does not appear here; (3) Title 18, United States Code, Section 2520, provides a complete defense for the claim of damages in this action; and (4) the doctrine of official immunity.

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Assistant Attorney General
Criminal Division

With reference to the allegations contained in the complaint of [REDACTED], we suggest the following responses.

1) The Federal defendants deny the allegation contained in paragraph 1 of the complaint.

2) Paragraph 2 of the complaint pleads no facts which require an answer but if it does, such allegations are denied.

3) The Federal defendants admit the allegations contained in paragraph 3 of the complaint.

4) The Federal defendants admit that defendants [REDACTED] and [REDACTED] are officers and agents of the United States as alleged in paragraph 4 of the complaint but deny all other allegations contained therein.

5) The Federal defendants admit that on November 9, 1973, they obtained an order from United States District Judge Robert Van Pelt authorizing interception of communications from and to telephone numbers [REDACTED]

[REDACTED] The Federal defendants allege that [REDACTED] had no proprietary interest in the above-described premises.

6) The Federal defendants admit that [REDACTED] but deny all other allegations contained in this paragraph.

7) The Federal defendants admit that evidence obtained pursuant to an order dated December 2, 1970, issued by United States District Judge Richard C. Robinson authorizing interception of certain electronic communications was suppressed as alleged in paragraph 7 of the complaint but deny all other allegations contained herein which allege the Federal defendants used any evidence, suppressed or not, obtained as a result of the order of December 2, 1970, in obtaining the order for interception of communications here in issue.

Assistant Attorney General
Criminal Division

8) The Federal defendants admit the allegations contained in the first sentence of paragraph 8 of the complaint. The remaining allegations contained in this paragraph are conclusions of law which require no answer.

9) The Federal defendants deny the allegations contained in paragraph 9 of the complaint.

10) The Federal defendants incorporate and reallege their answers to paragraphs 5 through 9.

11 through 14) The Federal defendants deny the allegations contained in paragraphs 11 through 14 of the complaint.

15) The Federal defendants incorporate and reallege their answers to paragraphs 5 through 14 of the complaint.

16 through 18) The Federal defendants deny the allegations contained in paragraphs 16 through 18 of the complaint.

19) The Federal defendants incorporate and reallege their answers to paragraphs 5 through 18 of the complaint.

20 through 23) The Federal defendants deny the allegations contained in paragraphs 20 through 23 of the complaint.

24) The Federal defendants deny the allegations contained in paragraph 24 of the complaint, except to the extent it is alleged certain monies were seized from the residence of [redacted] located at [redacted] [redacted] which is admitted. The Federal defendants allege the amount of money seized was [redacted] and not [redacted] as alleged in this paragraph.

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Pursuant to a conversation with [redacted] of your office, we have not, at his suggestion, responded to the allegations contained in the complaint of [redacted]
[redacted]

Enclosures (13)

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI
(ATTN: OFFICE OF LEGAL COUNSEL)

DATE: 11/5/75

FROM : ADIC, LOS ANGELES (62-7608) (RUC)

SUBJECT: JOHN JOSEPH SALANITRO, SR.
Versus
ROBERT H. BORK,
ET AL
(USDC, District of Nebraska)
Civil Action Number 75-0-211

PAMELA SALANITRO
Versus
ROBERT H. BORK,
ET AL
(USDC, District of Nebraska)
Civil Action Number 75-0-210

Re telephone call to Omaha, dated 11/4/75.

As per referenced telephone call with Omaha, it was determined that no new information has been received nor filed on the above captioned matter. As captioned civil action is being brought in the United States District Court, District of Nebraska, Omaha is the office of origin in this matter and no further action is pending in Los Angeles.

It should be noted that SA [REDACTED], a defendant in this matter, is currently assigned to the Los Angeles Division.

Instant matter is being RUC'd pending further developments in United States District Court, District of Nebraska.

2 - Bureau
2 - Omaha
1 - Los Angeles

RAS/smm

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- 1* -

62-7608-6
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FILED



SAC, Omaha (62-3445)

May 27, 1976

Director, FBI (182-2461)

PAMELA SALANTRO v. ROBERT H. BORK, et al.
(U.S.D.C., D. NEBRASKA)
CIVIL ACTION NO. 75-9-210

JOHN JOSEPH SALANTRO, SR., v. ROBERT H. BORK, et al.
(U.S.D.C., D. NEBRASKA)
CIVIL ACTION NO. 75-9-211

Captioned civil actions, filed on 6/4/75 named as parties defendants
Special Agents (SAs) [redacted] (FBIHQ), [redacted] (New York
Office), [redacted] (Chicago Office), and [redacted] (Los
Angeles Office).

For the information of the above employees, both civil actions were
dismissed without prejudice by Court Order entered on April 9, 1976, on
motion of the respective plaintiffs.

2 - New York
2 - Chicago
2 - Los Angeles

Consolidated
Initials <i>MJ</i>
Date <i>3-9-78</i>

62-7668-7
for
file advise
[redacted]
[redacted]

b6
b7C